APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER, PETITIONER

vs.

RAY H. PAGE, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1967
CERTIORARI GRANTED OCTOBER 9, 1967

Supreme Court of the United States

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No. 703

JACK ALLEN BARBER, PETITIONER

vs.

RAY H. PAGE, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Mandate, No. 8207, U. S. Court of Appeals, Tenth Circuit	4
Writ of habeas corpus	5
United States Marshal's return	6
Order of dismissal	7
Motion for leave to appeal in forma pauperis	9
Affidavit	10
Motion for certificate of probable cause	11
Certificate of probable cause	12
Order allowing appeal in forma pauperis	13

	Page
Notice of appeal	14
Exhibit 1—Pleading styled "Supplemental Jurisdiction"	15
Exhibit 2—Brief in support of petition in error, No. A-13252, Court of Criminal Appeals, State of Oklahoma (excerpts)	17
Exhibit 3—Petitioner's printed report in 388 Pacific Reporter, 2d Series	28
Order extending time to lodge record on appeal	41
Transcript of proceedings, April 13, 1966	42
Petitioner's witness:	
Barber, Jack Allen	43
Clerk's certificate	58
Order granting appellant leave to appeal in forma pauperis	59
Order of submission	59
Opinion	60
Judgment	63
Petition for rehearing	64
Order denying petition for rehearing en banc	66
Order denying petition for rehearing	66
Note re: mandate	66
Clerk's certificate	67
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	68

[fol. A]

C. E. BARNES FOR APPELLANT
CHARLES L. OWENS FOR APPELLEE

No. 1685 Misc.

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9015

JACK ALLEN BARBER, APPELLANT

vs.

STATE OF OKLAHOMA, APPELLEE

Appeal from the United States District Court for the Eastern District of Oklahoma

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Filed, United States Court of Appeals Tenth Circuit
Aug. 26, 1966, Robert B. Cartwright, Clerk

Before Judges Breitenstein, Aldrich, Kerr

[fol. B]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 5676, Civil

Pleas and Proceedings before The Honorable Edwin Langley, Judge of the United States District Court for the Eastern District of Oklahoma, presiding in the following entitled cause:

JACK ALLEN BARBER, PETITIONER

vs.

STATE OF OKLAHOMA, RESPONDENT

Filed, United States Court of Appeals Tenth Circuit
Aug. 26, 1966, Robert B. Cartwright, Clerk

[fol. 1]

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

GREETING:

Whereas, lately in the United States District Court for the Eastern District of Oklahoma, before you, or some of you in a cause between Jack Allen Barber, plaintiff and The State of Oklahoma, et al., defendant, No. 5676-Civil, the judgment of the said district court was entered in said cause on March 19, 1965.

as by the inspection of the transcript of the record _____ _____ of the said District Court, which was brought into the United States Court of Appeals, Tenth Circuit, by virtue of an appeal by Jack Allen Barber _____ _____ agreeably to the act of Congress, _____ _____ in such case made and provided, fully and at large appears:

AND WHEREAS, at the November Term, in the year of our Lord one thousand nine hundred and sixty-six, the said cause came on to be heard before the said United States Court of Appeals, on the transcript of the record from the said district court and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of dismissal is set aside and the case is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings in accordance with the opinion of the court.

January 3, 1966.

[fol. 2] You, therefore, are hereby commanded that such further _____ proceedings be had in said cause, in accordance with the opinion and judgment of this court _____ as according to right and justice, and the laws of the United States, ought to be had, _____.

WITNESS, the Honorable EARL WARREN, Chief Justice of the United States, the 10th day of February, in the year of our Lord one thousand nine hundred and sixty-six.

COSTS OF _____

Clerk: Flat Fee $_____)
Preparation of)
printed record $_____)
Printing record $_____)
_____)
$_____)

(Costs of appellant in forma pauperis unpaid, $25.00)

/s/ ROBERT B. CARTWRIGHT
Clerk of the United States Court
of Appeals, Tenth Circuit

No. 8207

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1966

JACK ALLEN BARBER, APPELLANT

vs.

RAY H. PAGE, Warden, Oklahoma State Penitentiary, APPELLEE

MANDATE

Filed, Feb. 14, 1966, JOHN B. FINK, Clerk, U.S. District Court

By LV
Deputy Clerk

[fol. 3]

HABEAS CORPUS D.C. Form 10

MARSHALS DOCKET NO. 131-66

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 5676

JACK ALLEN BARBER

vs.

THE STATE OF OKLA.

Received Mar. 30, 1966, U.S. Marshal's Office Muskogee, Oklahoma

To Ray H. Page, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma

YOU ARE HEREBY COMMANDED, to have the body of Jack Allen Barber by you restrained of his liberty, as it is said, by whatsoever names detained, together with the day and cause of him being taken and detained, before the Honorable Edwin Langley, Judge of the United States District Court for the Eastern District of Oklahoma, at the court room of said Court, in the City of McAlester, Oklahoma at 10:00 o'clock A.m., on the 13th day of April, 1966, then and there to do, submit to and receive whatsoever the said Judge shall then and there determine in that behalf; and have you then and there this writ.

WITNESS the Honorable Edwin Langley
United States District Judge at Muskogee, Oklahoma
this 30th day of March, A.D. 1966,

JOHN B. FINK
Clerk

By /s/ ARDYCE BUSE
Deputy Clerk.

Marshal's Return

I hereby certify & return that I received this Habeas Corpus in Muskogee, Okla. on 3-30-66 and on 3-30-66 at 12:45 pm at the Okla. State Penitentiary, McAlester, Okla. I served Ray H. Page Warden, by serving his sec. Joe Hawkins.

JACKIE V. ROBERTSON, U.S. Marshal

By: /s/ MACK HYDE JR.
MACK HYDE, JR. Deputy Marshal

Fee $ 3.00
Mileage 15.60
Total $18.60

Filed April 4, 1966.

[fol. 12]

ORDER

By order entered herein on March 19, 1965, by the Honorable Luther Bohenon, a judge of this court, the petitioner's application for writ of habeas corpus was dismissed after an evidentiary hearing, the court finding that the petitioner had not been deprived of his constitutional rights in the proceedings leading to the judgment and sentence pursuant to which he is now imprisoned. On appeal, the order was set aside and the case remanded for determination of whether the petitioner had exhausted his state remedies at the time application for the writ was filed in this court. A hearing was then held as directed, with the petitioner present, after which time was allowed for the submission of briefs.

Upon consideration of the evidence and a review of the file, including examination of the briefs, the court finds that at the time application for the writ was filed the petitioner had in fact exhausted the remedies available to him in the state courts. The specific area of inquiry here is whether the issue of confrontation of witnesses as a constitutional question was presented to the Oklahoma Court of Criminal Appeals on the appeal of the case following trial and conviction, and if not, whether any provision exists for the presentation of the issue now. At the hearing there was admitted in evidence without objection the brief of the petitioner on the appeal of his case to the Oklahoma appellate court. As Proposition 2 in the brief it was argued extensively that the use of a transcript without a showing of the exercise of diligence to secure the presence of the witness constituted prejudicial error, and one of the arguments on this point was that to do so was "not in keeping with the spirit and letter of the constitutional guarantee that the defendant in a criminal action has a right to be confronted face to face with the witnesses against him". The court is of the opinion that this was sufficient to raise the question as a constitutional issue. The fact that the Oklahoma Court of Criminal Appeals refused or neglected to consider the matter on that basis ought not be determinative.

Assuming, however, that the question was not adequately presented as a constitutional issue, under the current statutes and decisions in Oklahoma it cannot now be raised in the Oklahoma courts. The recently passed statute authorizing delayed appeals, 22 O.S.A. 1073, applies only to situations where a person convicted of a crime has been deprived of his constitutional right of appeal. No such denial of a constitutional right is here involved. Review under Oklahoma's habeas corpus statutes is largely limited to cases where no appeal has been [fol. 13] taken. A recent statement of the law in this state was made by the Oklahoma Court of Criminal Appeals in the case of Hampton v. Page, 37 O.B.A.J. 577 (March 19, 1966). In that case, in its syllabus, the court said:

> "Where petitioner has appealed from judgment of conviction, and judgment of conviction has been affirmed, and questions raised in habeas corpus proceedings were in evidence and known to petitioner at the time of appeal, and were matters which properly should have been presented by appeal, the Court of Criminal Appeals will not issue a writ of habeas corpus."

This court is of the opinion, therefore, and so finds, there is no remedy whereby the constitutional issue of confrontation can be presented to the Oklahoma courts by the petitioner. Accordingly, since the petitioner had exhausted his state remedies at the time of filing his petition for writ of habeas corpus in this court, the petition should be denied for the reasons stated in the order of this court heretofore referred to, entered on March 19, 1965.

IT IS THEREFORE ORDERED that the petition be and the same hereby is denied, and this action is dismissed.

/s/ EDWIN LANGLEY
District Judge

Filed June 20, 1966.

[fol. 14]

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Comes now the petitioner, Jack Allen Barber, by his attorney David K. Petty, and moves the court for an order permitting petitioner to prosecute an appeal from the judgment entered herein on the 20th day of June, 1966, in forma pauperis, pursuant to the provisions of title 28 United States Code, Section 1915, and in support thereof, attaches the affidavit of said petitioner. Petitioner further requests an order of this court directing the court reporter to transcribe and furnish to the Clerk of this court an original and three copies of the record of the proceedings had in the above case on April 13, 1966, at the expense of the United States of America.

JACK ALLEN BARBER, Petitioner
BY: /s/ DAVID K. PETTY
DAVID K. PETTY
Attorney for Petitioner
P. O. Drawer 130
McAlester, Oklahoma

I certify that a copy of the foregoing Motion was mailed this 28th day of June, 1966, to Attorney General, State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attorney for respondent.

/s/ DAVID K. PETTY
DAVID K. PETTY

Filed June 29, 1966.

AFFIDAVIT OF JACK ALLEN BARBER, PETITIONER

UNITED STATES OF AMERICA)
) ss:
EASTERN DISTRICT OF OKLAHOMA)

Jack Allen Barber, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in the above entitled action.

2. I desire to prosecute an appeal from the judgment entered in the above entitled action, but because of my poverty I am unable to pay the costs of such appeal or to give security therefore.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such appeal presents substantial questions.

4. The nature of the questions to be presented upon such appeal is as follows:

The trial court erred in failing to find that my constitutional right to be confronted with witnesses against me had been violated in my trial by the State of Oklahoma by the admission in evidence at said trial a transcript of testimony taken at my preliminary hearing.

[fol. 15] The trial court erred in denying my petition for writ of habeas corpus and in dismissing my action:

WHEREFORE, affiant prays that he may have leave to prosecute the said appeal in forma pauperis.

/s/ JACK ALLEN BARBER
JACK ALLEN BARBER, Petitioner

Subscribed and sworn to before me this 27 day of June, 1966.

/s/ HELEN O. LEE
Notary Public

My Commission Expires: 3-22-69
Filed June 29, 1966.

[fol. 16]

MOTION FOR CERTIFICATE OF PROBABLE CAUSE

Comes now the petitioner by his attorney, David K. Petty, and moves the Court to grant petitioner a Certificate of Probable Cause for Appeal for the following reasons:

On March 19, 1965, by order of the court the Honorable Luther Bohanon presiding this petitioner's application for Writ of Habeas Corpus then before the court was dismissed after an evidentary hearing.

On April 13, 1965, the Honorable Luther Bohanon issued a Certificate of Probable Cause for Appeal to this petitioner. Petitioner brought his appeal before the United States Court of Appeals for the Tenth Circuit which remanded the case to the trial court for a determination of whether the petitioner has exhausted his state remedies at the time his application for the writ was filed. On June 20, 1966, this court, the Honorable Edwin Langley presiding, found that petitioner had in fact exhausted his state remedies and denied the petitioner's application for the writ and dismissed the action. The reasons for the Honorable Luther Bohanon granting the Certificate of Probable Cause for Appeal to this petitioner on April 13, 1965, are still present and a Certificate of Probable Cause for Appeal from the judgment of this court entered on June 20, 1966, should be issued by this court.

Petitioner has alleged and offered evidence that his constitutional right to be confronted with witnesses against him was violated at his trial by the State of Oklahoma by the admission into evidence of the transcript of testimony of a witness against him which testimony had been taken at petitioner's preliminary hearing. Petitioner did not have the benefit of cross-examination of the witness whose testimony was admitted by transcript in petitioner's trial in the State Court and said witness was not present at petitioner's trial in the State Court for interrogation or cross-examination by petitioner.

Recent decisions by the United States Supreme Court have clarified and emphasized a defendant's right to be

confronted with witnesses against him as guaranteed by the United States Constitution and there is probable cause for an appeal by the petitioner on the ground that his constitutional right to be confronted with witnesses against him was violative in his trial by the State of Oklahoma.

WHEREFORE, Petitioner respectfully requests that this honorable court grant petitioner a Certificate of Probable Cause for Appeal.

JACK ALLEN BARBER, Petitioner

BY: /s/ DAVID K. PETTY
DAVID K. PETTY, Attorney for Petitioner
P. O. Drawer 130
McAlester, Oklahoma

[fol. 17] I certify that a copy of the foregoing Motion was mailed this 28th day of June, 1966, to Attorney General, State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attorney for respondent.

/s/ DAVID K. PETTY
DAVID K. PETTY

Filed June 29, 1966.

[fol. 18]

CERTIFICATE OF PROBABLE CAUSE

Now on this 29 day of June, 1966, this matter comes on for hearing upon motion of petitioner for Certificate of Probable Cause for Appeal and the Court after having heard the issues presented and having denied the relief sought by petitioner finds that probable cause exists for appeal

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT Certificate of Probable cause of appeal do issue herein.

/s/ EDWIN LANGLEY
United States District Judge

Filed June 29, 1966.

[fol. 19]

ORDER ALLOWING APPEAL IN FORMA PAUPERIS

Now on this 29 day of June, 1966, upon motion of the petitioner to appeal in forma pauperis from the order denying relief sought by said petitioner and it appearing that the petitioner is without means and that the appeal is not frivolous and is in good faith;

IT IS THEREFORE ORDERED that the appeal be allowed in forma pauperis.

IT IS FURTHER ORDERED that the court reporter transcribe and furnish to the clerk of this court an original and three (3) copies of the record of the proceedings had in the above case on April 13, 1966, at the expense of the United States of America.

/s/ EDWIN LANGLEY
United States District Judge

Filed June 29, 1966.

[fol. 20] NOTICE OF APPEAL

To State of Oklahoma, and Ray Page, Warden, Oklahoma State Penitentiary, Respondents, and to Charles Nesbitt, Attorney General for the State of Oklahoma, Attorney for Respondents:

You, and each of you, will please take notice that the petitioner, Jack Allen Barber, in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment and order denying petitioner's application for a Writ of Habeas Corpus entered in the above-entitled cause on the 20th day of June, 1966, and that the certified transcript of record will be filed in said appellate court within forty days from the filing of this notice.

Dated June 27, 1966.

/s/ DAVID K. PETTY
DAVID K. PETTY
Attorney for Petitioner

CERTIFICATE OF SERVICE

A true and correct copy of the above instrument was mailed to Mr. Charles Nesbitt, Attorney General of the State of Oklahoma, Oklahoma State Capitol Building, Oklahoma City, Oklahoma, on this 28th day of June, 1966.

/s/ DAVID K. PETTY
DAVID K. PETTY
Attorney for Appellant

Filed June 29, 1966.

[fol. 21] PLAINTIFF'S EXHIBIT 1

SUPPLEMENTAL JURISDICTION

Comes now, Jack Allen Barber, petitioner in the instant cause, who seeks further to invoke jurisdiction of the matter at hand to this Honorable Court, with the following words and figures:

(a) The United States Supreme Court held in; U.S. vs. Morgan, 74 S. Ct. 247, that:

(1) A Writ of Coram Nobis was available at common law, to correct errors of fact, and was allowed without limitation of time for facts effecting the validity and regularity of judgement in both civil and criminal courts.

(2) In behalf of unfortunates, the federal courts should act to do justice, if record makes plain a right to relief.

x (3) Writ of Error Coram Nobis has power in the "All Writs" section of judicial code.

(4) Federal Rules, Criminal Proceedure, rule 35, 18 U.S.C.A.; 28 U.S.C.A. Sections 1651 (a), 2255.

(5) Continuation of litigation after final judgement and exhausting or waiver of any statutory right of review, should be allowed through extraordinary remedy of Writ of Error Coram Nobis, only under circumstances compelling such action for purpose of achieving justice.

(b) Petitioner states that immediately after receiving notice of the denial of his application for rehearing by The State Court of Criminal Appeals, he was placed in a section of the prison which disallowed any communication with the Supreme Court of the United States and/or his attorney of record, which was necessary to his preparation and filing for certiorari in said Supreme Court.

(1) Petitioner did attempt, diligently, to file for certiorari, but to no avail and through no fault of his own.

Wherefore; Petitioner states that he has exhausted all remedies available to him, in that he was denied the privilege of communication, for the purpose of filing for certiorari in The United States Supreme Court.

Petitioner further states that a Writ of Error Coram Nobis has long been accepted as a collatoral Writ of Error between state and federal jurisdictions, and necessarily so, for in many case's, it is the only avenue by which a wrong may be made right.

Respectively submitted:

/s/ JACK ALLEN BARBER
JACK ALLEN BARBER
67027, Petitioner

Finis

Attest: Notary not available

/s/ OTIS R. WOODRING
Witness

/s/ HERMAN L. BARNETT
Witness

Filed Nov. 17, 1964.

[fol. 25]

PLAINTIFF'S EXHIBIT 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-13252

JACK ALLEN BARBER, PLAINTIFF IN ERROR

vs.

STATE OF OKLAHOMA, DEFENDANT IN ERROR

BRIEF IN SUPPORT OF PETITION IN ERROR

Statement of Facts

On August 25, 1961, plaintiff in error, Jack Allen Barber, was charged by Information in the District Court of Tulsa County, Oklahoma, with the crime of robbery with firearms conjoint. The Information was styled "State of Oklahoma, plaintiff, vs. Max Leroy Steed, Charles Henry Woods, Jack Allen Barber and E. M. (Pete) Bishop, defendants." The Information charged that the offense was committed on or about the 30th day of July, 1961, in Tulsa County. Defendant was arraigned on September 30, 1961, entered a plea of not guilty, and the case was set for trial on the October District Court docket. The case was passed, and on November 8, 1961, a co-defendant requested a severance and the same was granted. The within case was passed to, but continued from the December, January and February dockets. On February 22, 1962, permission was granted the State to file an amended Information.

The trial of the case before a jury commenced on March 5, 1962, and continued through March 8, 1962. At the conclusion of the trial and following instructions and argument of counsel, the jury retired, deliberated, and returned a verdict of guilty against the defendant. On March 9, 1962, the State read the jury the Information on a former conviction and presented evidence, the Court instructed on same and argument of counsel was heard. The jury retired, deliberated and returned, and found

the defendant guilty of robbery with firearms after former conviction of a felony, and assessed his punishment at fifteen years in the state penitentiary.

On March 19, 1962, the State, the defendant and defendant's attorney being present, the Court sentenced defendant to a term of fifteen years in the state penitentiary.

From said sentence, Jack Allen Barber has timely filed an appeal.

* * * *

[fol. 27] PROPOSITION NO. 2

THE COURT ERRED IN ALLOWING THE TESTIMONY OF THE STATE'S KEY WITNESS TO BE INTRODUCED BY TRANSCRIPT

The State, over the continuous and strenuous objection of the defendant, was allowed to introduce the testimony of Charles Henry Woods, the State's key witness, by transcript, taken at the preliminary hearing. We contend that the Court committed reversible error in allowing said testimony to be introduced by transcript. A reading of the Case-made will show that the State's case against the defendant Barber was predicated primarily and almost exclusively upon the testimony of Woods.

Prior to the reading of Woods' testimony from the transcript, taken at the preliminary hearing, defendant objected to the introduction of said evidence by transcript (C-M 50). In support of said objection the defendant made the following offer of proof:

(1) That Charles Henry Woods is a co-defendant in the instant case;

(2) That Charles Henry Woods was in custody and was confined to the Tulsa County jail, awaiting a preliminary hearing on the instant charge, and that he remained in the custody of the State of Oklahoma and confined to said county jail up to and through August 22, 1961, at which time he testified in the preliminary hearing, the transcript of which was being offered in testimony;

[fol. 28] (3) That between the time the State of Oklahoma took custody of Woods and the time he testified in the preliminary hearing in the instant case, the federal government filed three charges against him;

(4) That sometime after the preliminary hearing referred to above, the State of Oklahoma voluntarily released custody of Woods to the federal government;

(5) That at the time custody of Woods was voluntarily released by the State of Oklahoma to the federal government, the State of Oklahoma had every reason to believe, and did believe that Charles Henry Woods was to enter a plea of guilty to one or more of the federal charges and would be sentenced to a federal institution to serve some period of years;

(6) That at no time since the instant case has been set for trial has the State of Oklahoma requested the federal government or any of its authorities, including the Bureau of Prisons, the Attorney General of the United States, or the Department of Justice to bring Charles Henry Woods to Tulsa County, Oklahoma, to testify in the instant case;

(7) That the State of Oklahoma has made no attempt through the issuance of a subpoena to secure the attendance at the trial for the purpose of testifying the person of Charles Henry Woods;

(8) That since the preliminary hearing, Woods has entered a plea of guilty to an offense commonly known as the Dyer Act and has been sentenced to serve a term of five years in the federal penitentiary;

(9) That in addition, Woods has entered a plea of guilty to the offense of transporting stolen property in interstate commerce exceeding the value of $5,000.00, and has been sentenced to serve eight years in the federal penitentiary;

(10) That Charles Henry Woods is in custody of the federal government, confined to the federal prison located at Texarkana, Texas, and that said prison is outside the State of Oklahoma and outside the jurisdiction of this Court.

The trial court denied the offer of proof, to which ruling the defendant exeepted, and overruled the objection

of the defendant that the testimony of Woods be introduced by transcript, and permitted the offer of testimony of the witness Woods by and through the transcript of testimony of said Woods, to which ruling the defendant excepted. It should be pointed out here that there is no evidence in the record other than the offer of proof set out above, made by the defendant and denied by the Court, tending to show in any way why the witness, Charles Henry Woods, could not be present to testify in person and confront this defendant, as required by the Constitution and the Statutes of the State of Oklahoma.

[fol. 29] In this connection there is absolutely no evidence in the record other than the offer of proof, which was denied, to prove where the witness was. For all we know he could have been in the County jail on the eighth floor of the County Court House where the trial was proceeding. The Court and County Attorney took the position that it was incumbent upon the defendant to show why the transcript should not be admitted. As a result of this erronious theory, the County Attorney failed to recognize that the law actually imposes upon the State the duty to produce evidence why the transcript *should* be admitted, and as a result failed to produce one iota of evidence as to why the transcript should be introduced.

Article II, Sec. 20, of the Oklahoma State Constitution provides:

> "In all criminal prosecutions the accused shall have the right to * * * be confronted with the witnesses against him * * *"

This announcement is further carried out in Sec. 13, Title 22, of the Oklahoma Statutes Annotated, wherein it is stated:

> "In a criminal action the defendant is entitled:
>
> (3) to produce witnesses on his behalf and to be confronted with the witnesses against him in the presence of the court."

The Oklahoma court has generally allowed an exception to this Constitutional and statutory protection in in-

stances where a transcript of the testimony of the witness is offered which was taken at a preliminary hearing in the same cause. *Before such transcript may be offered, however, it is incumbent upon the State to show that they have used reasonable diligence in procurring the presence of the witness to testify, and* that he cannot be produced for any of the following reasons:

> (1) That the witness is dead; (2) has become insane, (3) left the state, (4) is sick and unable to testify, or (5) his whereabouts cannot with due diligence be ascertained. *Davis vs. State*, 201 P. 1001, 20 Okl. Crim. 203.

Everyone knew that the witness Woods was not dead, insane, or ill, and that his whereabouts were known at all times. In fact, the circumstances as indicated by the offer of proof indicate a design and strategy on the part of the County Attorney to provide for Woods' absence at the time of trial. This found to be true should be conclusive grounds for reversal. If, however, the Court is not fully persuaded, we respectfully ask the Court to search the record for one shred of evidence showing *any* effort, much less due diligence, on the part of the County Attorney, to produce the witness. It is not there, the County Attorney being willing to rely upon the mere fact that the witness was not in the State of Oklahoma to support his offer. This is not enough.

In the case of *Scott* v. *State*, 43 Okl. Crim. 232, 278 P. 393, the court said:

[fol. 30] "This court has repeatedly held that the rule admitting the transcript of the evidence of an absent witness as his deposition on final trial grows out of circumstances of necessity. The transcript or deposition of the testifying witness shall be excluded in all cases where the witness can be produced in person. The main reason for this is that the accused may desire to cross-examine the witness further and that the jury be given an opportunity to observe the witness and his demeanor on the witness stand. This question has been before this court a number of times.

"The case of Davis v. State, supra, in which the limitations of the rule were discussed and stated, supported by authorities therein cited, is in harmony with the statements made herein. It is not unusual; the cross-examination of the witness in the preliminary trial is more or less perfunctory, and by the time the case is on final trial the defendant has had more time for research and is better able to conduct a thorough cross-examination; and if it is proper for the witness to be produced, it is the right of the defendant to have him present. *Diligent effort made in good faith to produce the witness at the trial should be shown.*" Golden vs. State, 23 Okl. Crim. 243, 214 P. 946.

"We think this court in former opinions has followed a rule sufficiently liberal in permitting the testimony of the witness taken at a former trial or a preliminary hearing to be used in the absence of the witness, and that this should not by judicial construction extend or enlarge upon the rule announced in its former decisions. Cases perhaps would arise where the prosecuting officer might prefer to have the testimony taken at a former trial read to the jury rather than to run the risk of having the witness appear in open court on the witness stand, to be subjected to the rigid cross-examination where the jury could see the witness and judge of his demeanor on the witness stand. *To lay down a rule that a mere showing that the witness is another state, without requiring a showing that due diligence had been used to secure the attendance of the witness, might enable public prosecutors and others, if it appear to their interests, to cause witnesses to be absent from the jurisdiction of the court to escape further cross-examination. * * * What we do mean to hold is that it would be dangerous to relax the rule that reasonable effort and diligence to produce the witness should be shown.*

Quoting from *Davis* v. *State*, supra, to say that no diligence is required to produce the witness in open court, where it is possible to do so is

"not in keeping with the spirit or the letter of the Constitutional guarantee that the defendant in a criminal action has a right to be confronted face-to-face with the witnesses against him."

There is absolutely no showing whatsoever that the State exercised any diligence to return Woods to testify. For example, there is no showing the County Attorney ever contacted any federal officer or the director of the federal penitentiary, or the warden of the federal prison, requesting the return of Woods to Tulsa to testify. [fol. 31] The importance of the testimony contained in the transcript cannot be minimized. Without this testimony the State would have been unable to withstand a demurrer. In presenting evidence of such importance, it is basic that the defendant be confronted with the witness giving such testimony. The inflection given by the reader of the transcript, his demeanor on the witness stand (in this instance a trained investigator from the County Attorney's office), may be such as to leave an impression on the jury which is opposite to that of the absent witness. This is particularly true in this case since the credibility of the witness could not be judged by the jury, and his credibility was subject to great question because between the time of his testimony in the preliminary trial and the reading of his testimony at the time of trial, Woods had been twice convicted in the federal court and was then serving a term in the federal penitentiary. This fact could not be shown to the jury.

Again we ask the Court to search the record for any evidence showing just the slightest effort of the State to produce this witness, and we earnestly submit that on finding none (since there is none), rule that the trial court erred in allowing the testimony of such witness to be introduced by transcript.

* * * *

[fol. 37] PROPOSITION NO. 7

ERROR OF THE COURT IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS

A reading of the transcript will disclose the importance [fol. 38] of the testimony of the accomplice, Charles Henry "Chuck" Woods, in the State's case. For that reason it was vital that the Court properly instruct the jury concerning the law of accomplice and the corroboration of such testimony.

We invite the Court's attention to Instruction No. 4 given by the Court and appearing at p. 215 of the Case-made, which was the complete instruction given by the Court:

"Instruction No. 4

"You are instructed that a conviction cannot be had upon the testimony of an accomplice or accomplices, unless such testimony is corroborated by other evidence tending to connect the defendant with the offense, and such corroboration is not sufficient if it merely shows the commission of the offense.

"An accomplice includes any person who is connected with the crime by the commission of any unlawful act on his part, transpiring either before or at the time of the commission of said offense, or as a participant therein."

and also to the defendant's requested Instructions 1 and 2 appearing at pp. 220 and 221 of the Case-made:

"Defendant's Requested Instruction No. 1.

"You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroborating evidence is not sufficient if it merely tends to show the commission of the offense or the circumstances thereof. This does not mean a separate and complete proof of a crime but only that there should be some evidence of ma-

terial facts in addition to the testimony of the accomplice tending to connect the defendant with the commission of the offense charged. Evidence corroborating an accomplice tending to connect the defendant with the commission of the offense need not be direct but it may be circumstantial only.

"In this connection you are told that it is not sufficient corroboration for this purpose merely to connect defendant with the accomplice or accomplices or other persons participating in the crime, but the evidence must tend to connect the defendant with the crime itself and not simply with its perpetrators, and corroborating evidence may be sufficient, although of itself slight, but it is not sufficient if it merely tends to raise a suspicion of guilt.

"In this connection, you are further told that the witness, Charles H. "Chuck" Woods, was an accomplice as a matter of law within the meaning of this instruction.

"Hankins v. State, 71 P. 2d, 119, 62 Okl. Crim. 252;

Rogers v. State, 48 P. 2d-344, 57 Okl. Crim. 294;
Howerton vs. State, 88 P. 2d 904;
Kennedy vs. State, 83 P. 2d 193"

[fol. 39] *Defendant's Requested Instruction No. 2*

"You are instructed that whether an accomplice has been corroborated as required by statute may be determined by eliminating from the case the accomplice's evidence and examining the evidence of other witnesses to determine whether there is evidence tending to connect defendant with the commission of the offense; and if there is, accomplice is corroborated.

"McNack vs. State, 71 P. 2d 119, 62 Okl. Crim. 252"

We contend that the Court did not fully and sufficiently instruct the jury on the question of accomplice and corroboration in that the Court failed to instruct the jury in the following particulars:

(1) That Charles H. "Chuck" Woods was an accomplice as a matter of law.

In reversing the judgment of the District Court in *Spears* v. *State*, 89 Okl. Crim. 321, 207 P. 2d 363, this Court, after citing an instruction almost verbatim with the instruction given by the court in this case, said as follows:

> "This instruction insofar as it goes is a correct abstract statement of the law; however, there is no other instruction pertaining to the testimony of accomplices nor is the jury advised as to who are accomplices. The court should have given an instruction definin accomplices, *should have told the jury as a matter of law that the witnesses*, Royal Von Daugherty, E. D. Daugherty and John King, Jr., *were accomplices of defendant*, and that the defendant could not be convicted upon the testimony of those witnesses unless their testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

(2) That the court failed to instruct that it is not sufficient corroboration merely to connect the defendant with the accomplice or accomplices or other persons participating in the crime.

In this connection we cite to the Court the decisions cited above under Proposition No. 3, with particular reference to the testimony of Montez Dandridge. That this is clearly the law is enunciated in these cases, and yet when this case was submitted to the jury, under the instructions, they could find guilt if they merely found that the defendant had been in the company of the accomplice at any time. The requested instruction which was refused properly covered this point; the instruction given by the court did not. This is clearly error.

(3) The Court should have defined the word "corroboration" as was requested in defendant's requested instruction No. 2. The courts themselves have gone to great length to define corroboration and when it becomes sufficient, as indicated by the cases heretofore cited. To leave

to the jury that question of corroboration and when it becomes legally sufficient, under the instruction given by the court, would allow the jury to return a verdict of guilty if they found the defendant and the accomplice had breakfast or lunch together the day prior to the crime. This would clearly be error. It would allow the jury to speculate on what facts would constitute sufficient corroboration.

[fol. 40] The instructions requested by the defendant were clear and fairly recite the law of accomplice and corroboration, and should have been given. The failure of the court to give them and to substitute in lieu thereof the instruction he did give on this subject, and which for the reasons cited above did not thoroughly instruct, was error.

* * * *

[fol. 41] CONCLUSION

Without minimizing any of the errors argued in this brief, we wish in conclusion to call the Court's particular attention to Propositions 2, 3, 5 and 7 which point out error of the court that denied the defendant a fair trial, that indicated a passion for conviction on the part of the court as well as the County Attorney, that allowed the jury to consider incompetent evidence under faulty instructions—any one of which standing alone would warrant a reversal.

For these reasons and all of the propositions urged above, we respectfully submit that the conviction and sentence of the defendant, Jack Allen Barber, should be reversed.

TUCKER, BOYD & PARKS
217 West Fifth Street
Tulsa, Oklahoma
Attorneys for Plaintiff in Error

[fol. 42]

PLAINTIFF'S EXHIBIT 3—5676

JACK ALLEN BARBER, Plaintiff in Error

v.

THE STATE OF OKLAHOMA, Defendant in Error

No. A-13252

Court of Criminal Appeals of Oklahoma
Nov. 20, 1963

Rehearing Denied Jan. 15, 1964

The defendant was convicted in the District Court of Tulsa County, Robert L. Wheeler, J., of robbery with firearms after former conviction of felony, and he appealed. The Court of Criminal Appeals, Johnson, J., held that defendant who announced ready for trial and waited until after opening statement by plaintiff had waived objection that robbery information charged only three men on its face while four men were mentioned in body of information, and that testimony of seven witnesses who each partially corroborated testimony of accomplice and each testified to a certain phase of the robbery sufficiently corroborated accomplice's testimony.

Affirmed.

1. Indictment and Information 196(1)

Defendant who announced ready for trial and waited until after opening statement by plaintiff to object that robbery information charged only three men on its face while four men were mentioned in body of information had waived the objection.

[fol. 43] 2. Indictment and Information 133(1), 196(1)

Objections appearing on face of indictment or information, except those relating to jurisdiction of court, subject matter of offense, or question whether facts stated constitute public offense, must be presented by demurrer and are waived if not so presented in proper time.

3. Indictment and Information 133(7)

Remedy to sufficiency of robbery information after announcing ready for trial was by motion objecting to introduction of evidence at time of trial or in arrest of judgment, not by demurrer. 22 Okl.St.Ann. § 512.

4. Indictment and Information 150

In ruling on demurrer to information, trial court must only determine whether information is reasonably certain as to offense charged and is couched in language that enables person of common understanding to know what is intended and that makes it possible for judgment of acquittal or conviction to be bar to subsequent prosecution for same offense.

5. Criminal Law 543(1)

Transcript of testimony which was given at preliminary hearing and taken down in presence of defendant and his counsel who cross-examined witness and which was filed with clerk was admissible where witness was not present for trial and could not be found in jurisdiction because witness was serving two rather extended terms in federal penitentiary.

6. Criminal Law 511(1)

Testimony of seven witnesses who each partially corroborated testimony of robbery accompice and each testified to a certain phase of the robbery sufficiently corroborated accomplice's testimony. 22 Okl.St.Ann. § 742.

7. Criminal Law 511(2)

In face of challenge on appeal to sufficiency of evidence to corroborate accomplice, strongest view warranted of corroborating testimony will be taken and verdict will be upheld if there is corroborating evidence tending to connect defendant with commission of the offense. 22 Okl.St. Ann. § 742.

8. Criminal Law 511(1)

Corroborating evidence is not required to cover every material point testified to by an accomplice or to be suf-

ficient alone to warrant guilty verdict, but if accomplice is corroborated as to one material fact by independent evidence tending to connect defendant with commission of crime, jury may infer that accomplice speaks truth as to all. 22 Okl.St.Ann. § 742.

9. Criminal Law 741(5)

Weight and sufficiency of evidence corroborating accomplice is for jury. 22 Okl.St.Ann. § 742.

10. Criminal Law 1048

Errors to which no exceptions were taken will not be considered on appeal unless jurisdictional or fundamental in character.

11. Criminal Law 1162, 1163(1)

Error alone does not reverse judgments for conviction, but error plus injury is necessary, and burden is upon plaintiff in error to establish prejudice to his substantial rights by the error.

12. Criminal Law 829(1)

Refusal to give requested instructions which were not as concise as those that were given and that fairly stated the law was not reversible error.

13. Criminal Law 822(1)

All instructions given should be considered, and where they fairly and fully present the issues involved and no fundamental error occurs, case will not be reversed on appeal.

14. Criminal Law 829(1)

Refusal of requested instructions is not error where substance of requested instructions is covered by given instructions.

15. Criminal Law 1166(1)

Constitutional provision requiring accused in capital cases to be furnished with list of witnesses called in chief did not entitle defendant to reversal of conviction because

[fol. 44] of use of witness whose name had not been endorsed on information in hearing which concerned former convictions and which was held after defendant was found guilty of crime charged. O.S. 1961 Const. art. 2, § 20.

Syllabus by the Court

1. Objections which appear upon the face of an indictment or information, except those which relate to the jurisdiction of the court, or subject matter of the offense, or that facts stated do not constitute a public offense, must be presented by demurrer, and if not so presented in proper time, they are waived.

2. Defendant's remedy to test sufficiency of the information, after announcing ready for trail, was by motion objecting to introduction of evidence at time of trial or in arrest of judgment, but not by demurrer. 22 O.S.A. § 512.

3. In ruling upon demurrer to information, it was only incumbent on trial court to determine whether information was reasonably certain as to offense charged and was couched in such language as to enable a person of common understanding to know what is intended so that he may prepare his defense, and so that a judgment of acquittal or conviction would be a bar to a subsequent prosecution for the same offense.

4. Where the testimony of the witness was given at the preliminary examination and taken down by the reporter in the presence of the defendant and his counsel, who cross-examined him, and such testimony was filed with the clerk, the transcript is admissible where the witness is not present and cannot be found in the jurisdiction.

5. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of an offense, or the circumstances thereof. 22 O.S.A. § 742.

6. Where the sufficiency of the evidence to corroborate an accomplice is challenged, Court of Criminal Appeals will take the strongest view of the corroborating testimony that such testimony will warrant, and, if it can say

that there is corroborating evidence tending to connect defendant with the commission of the offense, it will uphold the verdict.

7. It is not essential that corroborating evidence shall cover every material point testified to by an accomplice, or be sufficient alone to warrant a verdict of guilty. If the accomplice is corroborated as to one material fact or facts by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all. Such corroborating evidence, however, must show more than the mere commission of the offense or circumstances thereof.

8. The weight and sufficiency of corroborating evidence is for the jury, and where the jury has returned its verdict, the Court of Criminal Appeals will take the strongest view of the corroborating testimony that the evidence warrants.

9. Errors to which no exceptions were taken will not be considered on appeal unless they are jurisdictional or fundamental in character.

10. It is not error alone that reverses judgments of conviction of crime in this State, but error plus injury, and the burden is upon the plaintiff in error to establish to the Court of Criminal Appeals the fact that he was prejudiced in his substantial rights by the commission of error.

11. All instructions given by the trial court should be considered, and where they fairly and fully present the issues involved, and no fundamental error occurs whereby the defendant has been prejudiced or deprived of a substantial right, the case will not be reversed on appeal.

12. It is not error for trial court in criminal prosecution to refuse defendant's requested instructions where substance of requested instructions is covered by given instructions.

[fol. 45] Appeal from the District Court of Tulsa County; Robert L. Wheeler, Judge.

Jack Allen Barber was convicted of the crime of robbery with firearms, after former conviction of a felony, and appeals. Affirmed.

Ed Parks, Tulsa, for plaintiff in error.

Mac Q. Williamson, Atty. Gen., Sam H. Latimore, Asst. Atty. Gen., for defendant in error.

JOHNSON, Judge:

On August 25, 1961 the paintiff in error, Jack Allen Barber, hereinafter referred to as defendant, was charged by information in the district court of Tulsa County with the crime of robbery with firearms, conjoint. The information named as defendants Max Leroy Steed, Charles Henry Woods, Jack Allen Barber and B. M. (Pete) Bishop as defendants. The information charge that the offense was committed on or about July 30, 1961 in Tulsa County. This defendant was arraigned on September 30, 1961, entered a plea of not guilty, and the case was set for trial on the October district court docket. The case was passed, and on November 8, 1961, a co-defendant requested a severance, and the same was granted. After several continuances, and on February 22, 1962, the State was granted permission to file an amended information, against this defendant.

On March 8, 1962 the jury returned a verdict finding defendant guilty, and on March 9, 1962 the State read to the jury the information on a former conviction and presented evidence, the court instructed on same, and argument of counsel was heard. The jury found the defendant guilty of robbery with firearms after former conviction of a felony, and assessed his punishment at 15 years in the state penitentiary. Defendant was sentenced on March 19, 1962, and appeal has been perfected to this Court.

[1, 2] Defendant's first proposition is that the court erred in overruling the demurrer of the defendant to the information filed. The accused by counsel had entered a plea of not guilty on his first appearance in court, and had later, when the case was called for trial, through his counsel, announced ready for trial without filing a demurrer to the information. Then after the jury had been selected and sworn, and the opening statement by the plaintiff given, the accused, through his attorney, undertook for the first time to orally demur to the information, on the grounds that there were only three men charged on the face of the information with robbery, while there were four mentioned in the body of the information. This

proposition certainly has no merit for this Court has held that:

> "Objections which appear upon the face of an indictment or information, except those which relate to the jurisdiction of the court, or subject matter of the offense, or that facts stated do not constitute a public offense, must be presented by demurrer, and if not so presented in proper time, they are waived."

Richards v. State, Okl.Cr., 278 P.2d 253; Simpson v. State, 16 Okl.Cr., 533, 185 P. 116; and Roberts v. State, 72 Okl. Cr. 384, 115 P.2d 270.

[3] The defendant's remedy to the sufficiency of the information, after announcing ready for trial, was by motion objecting to introduction of evidence at time of trial or in arrest of judgment, but not by demurrer. Jennings v. State, 92 Okl.Cr. 347, 223 P.2d 562.

[4] And finally this Court has held that in ruling upon a demurrer to the information, it is only incumbent on the trial court to determine whether the information was reasonably certain as to the offense charged and was couched in such language as to enable a person of common understanding to know what is intended, so that he may prepare his defense, and also so that a judgment of acquittal or conviction would be a bar to a subsequent prosecution for the same offense. Johnson v. State, 79 Okl.Cr. 71, 151 P.2d 801.

[fol. 46] The second proposition presented is that the trial court erred, when it allowed the testimony of a key witness for the State to be introduced by transcript. The defendant relies on four cases to sustain his contention, Golden v. State, 23 Okl.Cr. 243, 214 P. 946; Davis v. State, 20 Okl.Cr. 203, 201 P. 1001; Scott v. State, 43 Okl. Cr. 232, 278 P. 393; and Foster v. State, 35 Okl.Cr. 70, 248 P. 847.

Each of these cases was distinguishable from the present case. The Golden case presents a subpoena that was returned with a notation, "not found" endorsed thereon and there was no evidence or showing that the witness was out of the State or out of the jurisdiction of the court. The circumstances in the Davis case showed that the wit-

ness was a resident of Grady County and no subpoena had been issued for him, he had merely orally promised to attend the trial and no effort had been made to serve him. Further evidence showed that he was only temporarily out of the State, therefore the transcript from the preliminary could not be introduced.

In the Foster case the transcript that the State attempted to introduce was one taken in a case other than the one being tried, therefore this Court held that evidence taken in a proceeding in which the defendant was not a party was prejudicial error.

Finally, in the Scott case, the record shows there was great confusion as to the whereabouts of the witness whose testimony the State attempted to introduce by transcript. However, there was no definite proof that he was not within the State of Oklahoma, therefore the Court in an opinion by Judge Davenport held that the transcript could not be introduced.

In the instant case there is no question as to the whereabout of Charles Henry Woods. He had been in the custody of the Federal Government for some time, and was confined in the Federal prison in Texarkana, Texas, at the time of the present trial. This Court has been very explicit in this and as so ably pointed out in the State's brief, "There can be no question under the circumstances of this case."

[5] Where the testimony of the witness was given at a preliminary examination, and taken down by the reporter in the presence of the defendant and his counsel who cross examined him, and such testimony was filed with the clerk, the transcript is admissible where the witness is not present and cannot be found in the jurisdiction. Fitzsimmons v. State, 14 Okl.Cr. 80, 166 P. 453; Jeffries v. State, 13 Okl.Cr. 146, 162 P. 1137; Henry v. State, 10 Okl.Cr. 369, 136 P. 982, 52 L.R.A., N.S., 113; Edwards v. State, 9 Okl.Cr. 306, 131 P. 956, 44 L.R.A., N.S. 701; Valentine v. State, 16 Okl.Cr. 76, 194 P. 254; Clark v. State, 28 Okl. Cr. 31, 228 P. 791.

Counsel for the defendant states that the State made no effort to return Woods for the trial. Under the above rulings, it was not necessary. The witness was certainly out of the State and out of the jurisdiction of the court, as

counsel for the defendant himself admitted when he said the witness was serving two rather extended terms in the Federal Penitentiary. Therefore, you could say that there definitely was a permanency to his absence.

In Serna v. State, 110 Tex.Cr.R. 220, 7 S.W.2d 543, the Court of Criminal Appeals of the State of Texas said:

> "Another objection urged to the reproduction of Teller's evidence was that his absence from the state was only temporary. We glean from the record that Teller's punishment had been assessed at confinement in the federal penitentiary for one year and six months; that he was at the time of the trial in the federal penitentiary in the state of Kansas, had been there some five or six months, and had about a year more to serve before the expiration of his sentence. His family lived in the county where the trial was had, and it may be assumed that Teller intended to return to Texas when released from prison. Appellant cites Whorton v. State, 69 Tex.Cr.R. 1, 152 S.W. 1082; Post v. State, 10 Tex.App. 579; Peddy v. State, 31 Tex.Cr.R. 547, 21 S.W. 542; Anderson v. State, 74 [fol. 47] Tex.Cr.R. 621, 170 S.W. 142; Modello v. State, 85 Tex.Cr.R. 291, 211 S.W. 944; Brent v. State, 89 Tex.Cr.R. 546, 232 S.W. 845—as supporting his proposition that, before former evidence of a witness who is out of the state may be reproduced, it is necessary that the predicate show his absence from the state to be 'permanent.' Article 749, C.C.P., provides in substance that, before the evidence of an absent witness may be used, it must be shown that he has 'removed beyond the limits of the state.' 22 Corpus Juris. § 519, states the rule which obtains in this state as follows:
>
> " 'Some authorities consider that the absence of the witness must have a character of permanency, and a mere transient absence will not suffice. * * *'
>
> "We think, where our decisions use the word 'permanent' removal or absence, it must be construed as the antithesis of 'temporary' or 'transient.' Such we understand to be the announcement in Brent's Case,

supra. If a witness should accept employment in another state for a definite term of two years, with the purpose of returning at the end of the two years, we think his absence would have a character of 'permanancy' about it. So in the present case the removal of Teller, while involuntary on his part, had a very decided character of permanency for the duration of his absence. He could not return, however much he might desire to do so, and the fact that he intended to return to Texas when his sentence expired would, in our opinion, be no bar to the reproduction of his evidence."

[6] In the appellant's third proposition, it is contended that the court erred in refusing to sustain defendant's demurrer to the State's evidence. This contention is based upon the alleged lack of corroboration of the testimony of the accomplice, Charles Henry Woods.

This Court has thoroughly studied the casemade and the testimony of all of the witnesses, and after this thorough study, cannot help but disagree with the learned counsel for the defendant on this proposition.

There were seven witnesses whose testimony each partially corroborated the testimony of the accomplice Woods. Each of these testified to a certain phase of the robbery and when these are all considered together, we feel that the testimony of Woods is certainly corroborated, as did the jury in this case.

This Court has by numerous decisions established the principle that is set forth in our statutes:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show[s] the commission of the offense or the circumstances thereof." 22 O.S.A. § 742.

[7] In the instant case, corroborating witnesses placed the accused with the other perpetrators of this crime, during the planning stages. Further testimony of independent witnesses established the kind of automobile he was driving and the type of clothes that he was wearing. Also

corroborating witnesses established that one person was wearing a woman's stocking around his head, as the accomplice Woods said the accused was. Then, finally, several months after the robbery the accused in the presence of another corroborating witness pointed out the door through which the robbers entered during the robbery. These certainly seem sufficient to corroborate the accomplice Woods and this Court has held that where the sufficiency of the evidence to corroborate an accomplice is challenged this Court will take the strongest view of the corroborating testimony that such testimony will warrant, and, if it can say that there is corroborating evidence tending to connect the defendant with the commission of [fol. 48] the offense, it will uphold the verdict. Heartsill v. State, Okl. Cr., 341 P.2d 625; Taylor v. State, 90 Okl. Cr. 283, 213 P.2d 588; Rushing v. State, 88 Okl.Cr. 82, 199 P.2d 614; Smith v. State, Okl.Cr., 278 P.2d 557; Wilcoxon v. State, Okl. Cr., 343 P.2d 194; Ringer v. State, Okl.Cr., 356 P.2d 787; and Barrett v. State, Okl.Cr., 357 P.2d 1020.

[8, 9] Also this Court said in Scott v. State, 72 Okl.Cr. 305, 115 P.2d 763:

> "It is not essential that corroborating evidence shall cover every material point testified to by [an] accomplice or be sufficient alone to warrant a verdict of guilty. If the accomplice is corroborated as to one material fact or facts by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all. Such corroborating evidence, however, must show more than the mere commission of the offense or circumstances thereof.
>
> "The weight and sufficiency of corroborating evidence is for the jury, and, where the jury has returned its verdict, this court will take the strongest view of the corroborating testimony that the evidence warrants."

And in a more recent opinion written by Judge Nix this Court has said:

> "It is not essential that evidence corroborating an accomplice shall cover every material point testified to

by the accomplice, or be sufficient alone to warrant a verdict of guilty, and if the accomplice is corroborated as to some material fact by independent evidence tending to connect [the] defendant with the crime, the jury may from that infer that he speaks the truth as to all."

Crum v. State, Okl.Cr., 383 P.2d 45.

Finally, if the corroborating testimony given in this case is applied to the rules set down by the Supreme Court of Montana in State v. Cobb, 76 Mont. 89, 245 P. 265, which rules are as follows:

"(a) The corroborating evidence may be supplied by the defendant or his witnesses.

"(b) It need not be direct evidence—it may be circumstantial.

"(c) It need not extend to every fact to which the accomplice testifies.

"(d) It need not be sufficient to justify a conviction or to establish a prima facie case of guilt.

"(e) It need not be sufficient to connect the defendant with the commission of the crime; it is sufficient if it tends to do so."

there can be no question as to the sufficiency of this testimony.

Proposition 4 was abandoned by the counsel for defendant.

[10, 11] Proposition 5 presented by the defendant is that the trial court committed error when it admitted certain evidence over the objection of the defendant's counsel. This might possibly have been a meritorious proposition had counsel for the defendant reserved an exception to the ruling of the trial court when it admitted Exhibits 15, 16, and 17. The decision of this Court in Williams v. State, Okl.Cr., 373 P.2d 85 is applicable to the decision:

"1. Errors to which no exceptions were taken will not be considered on appeal unless they are jurisdictional or fundamental in character.

"2. It is not error alone that reverses judgments of conviction[s] of crime in this state, but error plus

injury, and the burden is upon the plaintiff in error to establish to this court the fact that he was prejudiced in his substantial rights by the commission of error."

Suffice it to say that had the defendant properly reserved his exceptions, this would not constitute sufficient grounds for reversal.

The defendant is of the opinion that the trial court committed error in refusing to give his requested instructions and this is presented in his proposition 7.

[fol. 49] [12] This Court does not agree. The instructions given by the trial court certainly fairly stated the law and although more concise than the requested instructions of the defendant, a refusal to give these requested instructions would not constitute reversible error.

[13] All of the instructions given by the trial court should be considered, and where they fairly and fully present the issues involved, and no fundamental error occurs whereby the defendant has been prejudiced or deprived of a substantial right the case will not be reversed on appeal. Murphy v. State, 79 Okl.Cr. 31, 151 P.2d 69.

[14] And further it is not error for the trial court in criminal prosecutions to refuse defendant's requested instructions where substance of requested instructions is covered by given instructions. Wingfield v. State, 89 Okl.Cr. 45, 205 P.2d 320; Myers v. State, 83 Okl.Cr. 177, 174 P.2d 395.

The final proposition argued by the defendant is his proposition 8, which states that the trial court committed error when it permitted a witness to testify on behalf of the State who had not been endorsed on the information or on the list of witnesses given to the defendant by the State, over the objections of the defendant.

[15] In this proposition the defendant's counsel relies on Art. 11, § 20 of the Oklahoma Constitution, which states, in part:

"He [the accused] shall have the right to be heard by himsef and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be

called in chief, to prove the allegations of the indictment or information, together with their post office addresses."

However, this witness, Betty Mitchell, who substituted for one Bess Wilson, was not used in the case in chief, but in the subsequent hearing concerning the defendant's former convictions. He had already been found guilty, and her testimony had nothing to do with the verdict of the jury or the judgment of the court in this finding of guilty. Therefore, their reliance on this constitutional provision is without merit and not grounds for a reversal.

All of the propositions of the defendant were not discussed individually, but all questions of law have been thoroughly considered by the Court in this opinion, and the Court finds no fundamental error. Therefore, the judgment and sentence of the district court of Tulsa County is accordingly affirmed.

BUSSEY, P. J., and NIX, J., concur.

[fol. 50]

ORDER EXTENDING TIME TO LODGE RECORD ON APPEAL

Now on this 19 day of July, 1966, application having been made for additional time within which to lodge transcript of record on appeal in the above styled and numbered cause; and it appearing that the application is timely made, the Court is of the opinion that the same should be granted.

IT IS THEREFORE ORDERED that the time to lodge the record on appeal herein in the United States Court of Appeals, be and the same is extended to and including the 26th day of August, 1966.

/s/ EDWIN LANGLEY
United States District Judge

Filed July 19, 1966.

[fol. 51]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF OKLAHOMA

Filed Aug. 18, 1966, John B. Fink, Clerk, U.S. District Court, By ....., Deputy Clerk

No. 5676—Civil

JACK ALLEN BARBER, PETITIONER

vs.

STATE OF OKLAHOMA, RESPONDENT

BEFORE: HONORABLE EDWIN LANGLEY, United States District Judge, Eastern District of Oklahoma.

TRANSCRIPT OF PROCEEDINGS

In the Federal Building and Courthouse
McAlester, Oklahoma, April 13, 1966

APPEARANCES:

Mr. David K. Petty, of Arnote & Bratton, Attorneys at Law, McAlester, Oklahoma, for the Petitioner.

Mr. Charles Owens, Assistant Attorney General, State Capitol Building, Oklahoma City, Oklahoma.

[fol. 52] PROCEEDINGS

April 13, 1966

THE COURT: The Clerk will call the case.

THE CLERK: No. 5676 Civil, Jack Allen Barber vs. The State of Oklahoma.

MR. PETTY: The petitioner is ready, Your Honor. I am David K. Petty, appearing for Jack Allen Barber.

THE COURT: And you are ready?

MR. PETTY: Yes, Your Honor.

THE COURT: Are you ready, Mr. Owens?

MR. OWENS: The State is ready, Your Honor.

THE COURT: Now, this was a case that was handled by Judge Bohanon in which the Petition was denied. He asked me to hear this to determine whether the petitioner

has exhausted his State remedies, and that is what we are here for.

MR. PETTY: Yes, Your Honor, that's correct. The petitioner appealed the decision of the District Court to the Tenth Circuit Court of Appeals, and on presentation of oral argument to the Court of Appeals the Court remanded the case to this Court for determination of that specific issue, as to whether or not the petitioner had exhausted his State remedies.

In its opinion, Your Honor, the Court of Appeals stated that they could find nothing in the record which showed an allegation or a showing of exhaustion of remedies by Mr. Barber. I think it might help, at least provide a rec- [fol. 53] ord for the Tenth Circuit when the case goes back to them, if I could have some testimony from him at this time.

THE COURT: I am not quite sure, from reading the opinion, whether it's a question of fact or a question of law as to whether he has exhausted his remedies, but I will hear him and anything else that you have to offer on it, and then from the Attorney General. Then any argument that you all may have on the matter.

All right, bring Mr. Barber around.

JACK ALLEN BARBER

a witness sworn and produced in his own behalf, testified on his oath, as follows, to-wit:

THE CLERK: Be seated, please, and state your name.
THE WITNESS: Jack Allen Barber.

DIRECT EXAMINATION

BY MR. PETTY:

Q Mr. Barber, are you the petitioner in this case No. 5676, styled Jack Allen Barber, Petitioner, vs. State of Oklahoma?

A I am.

Q And this case is filed in the United States District Court for the Eastern District of Oklahoma?

[fol. 54] A Yes, sir.

Q Mr. Barber, who filed your initial pleading or Petition in this Court?

A I did.

Q Did you at any time file supplemental pleadings or additional pleadings to that Petition?

A Yes, sir.

Q Can you identify this copy as one you have filed?

A Yes, sir, that is my supplemental.

MR. PETTY: Your Honor, at this time we would like to introduce this Petitioner's Exhibit No. 1 in evidence.

THE COURT: Very well. Any objection?

MR. OWENS: No objections, Your Honor.

THE COURT: All right, it may be admitted.

Q (By Mr. Petty) Mr. Barber, I hand you what has been marked Petitioner's Exhibit No. 1 and ask you to read a paragraph from the third page of this Exhibit.

A "Wherefore Petitioner states that he has exhausted all remedies available to him."

THE COURT: Wait just a minute, let me find it, let me see what you have.

MR. PETTY: This was filed November 17, 1964, Your Honor.

THE COURT: All right, go ahead.

Q (By Mr. Petty) You stated that you did prepare [fol. 55] this pleading?

A Yes, sir.

Q Mr. Barber, do you recall—strike that.

You were convicted in the Trial Court in the State of Oklahoma for the crime of robbery, is that correct?

A Robbery With Firearms after former conviction of a felony.

Q Was this conviction by you appealed to any court in Oklahoma?

A Yes, sir, to The Oklahoma Court of Criminal Appeals.

Q And in that Appeal to The Oklahoma Court of Criminal Appeals do you know if you or you by your counsel raised the proposition that your Constitutional Rights to be confronted with witnesses against you, do you know if that was raised in this Appeal?

A Yes, it was. I believe it quoted the Oklahoma Constitution in regard to confrontation of a witness.

Q So, that the Court of Criminal Appeals had this matter of violation to your Constitutional Rights being violated, they had that matter before it?

A Yes, sir, they did.

Q And what was the decision in that case? What did the Oklahoma Court of Criminal Appeals do, did they affirm or reverse?

A They affirmed the conviction.

[fol. 56] MR. PETTY: I have no other questions of Mr. Barber.

THE COURT: Go ahead, Mr. Owens.

MR. OWENS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. OWENS:

Q Mr. Barber, you were represented on your appeal by retained counsel, weren't you?

A Yes, sir.

Q Who was he?

A Mr. Ed Parks of Tulsa.

Q After the Court of Criminal Appeals affirmed your conviction did Mr. Parks or yourself attempt to obtain a Writ of Certiorari from The United States Supreme Court?

A I attempted to, I asked Mr. Parks to file for Certiorari.

Q And you did?

A I asked him to, and then I was placed on maximum security, in the Maximum Security section of the prison immediately after my re-hearing was denied in The Oklahoma Court of Criminal Appeals.

Q So, you never did file a petition?

A Just a moment, please. When I was taken off maximum security, some 70 days later, I didn't have, I attempted to get hold of Mr. Parks and he wrote me and [fol. 57] told me he did not know how to proceed in Federal Courts. So, my former wife retained Mr. Gene Stipe of McAlester to file the Writ of Certiorari for me. I

never heard from Mr. Stipe. My mother then retained Mr. Charles Pope of Tulsa to file a Writ of Certiorari for me. I never heard from him again. During that time I ran out of time. I wrote to Mr.—Associate Justice Mr. Byron White and asked him for an extension of time in which to file for Certiorari. He granted me 30 days. Before I could get the Writ filed time had expired.

I was in lock-up, in other words Maximum Security section and was not given pencil, paper, although I requested same.

Q So, again you have not filed a petition with The United States Supreme Court, is that your testimony?

A Through no fault of mine.

THE COURT: Just answer the questions, Mr. Barber.

A Yes, sir.

Q Have you ever filed a petition for Writ of Habeas Corpus with the Court of Criminal Appeals with The State of Oklahoma?

A No, sir, I had no issues that had not already been presented to them.

Q In other words, it's your testimony that the only issue now is the question of denial of the right to be confronted by a witness?

[fol. 58] A That is not all the issues, that is one issue that I have on appeal to the Tenth Circuit now.

Q Well, you have not filed a petition for Writ of Habeas Corpus with the Court of Criminal Appeals, have you?

A It's not a remedy to me.

THE COURT: Just answer the questions, Mr. Barber.

THE WITNESS: No, sir, I have not.

MR. PETTY: I have no further questions.

MR. OWENS: I have no further questions, Mr. Barber.

THE COURT: All right, you may step down.

(Witness withdraws)

MR. PETTY: Your Honor, we feel like this allegation that is contained in plaintiff's Exhibit No. 1 to the effect that he has exhausted his remedies is a sufficient allega-

tion upon which to base our argument that he has exhausted his remedies. The United States Circuit Court for the Tenth Circuit mentioned that an allegation was essential, and at this time I would like to amend the original pleading or Petition filed in this case by Mr. Barber so there can be no question that the allegation of exhaustion of State remedies is sufficiently set forth.

THE COURT: Well, you may do so. I think, though, that the allegation supported by the testimony is sufficient. The bare allegation that he has exhausted his State remedies without stating in the application or Petition what he [fol. 59] has done in that regard is in my opinion not sufficient, but he has testified now as to what it was. I think that is sufficient to base a finding of what he has done that he considers exhausting his State remedies. You may, however, file a supplemental or amendment to the application if you wish to do so.

MR. PETTY: Fine. I would like to just make a brief presentation on points of law and cite some cases to Your Honor that will point out, I believe, that Mr. Barber has in fact exhausted his State remedies.

THE COURT: Very well, but let me see whether or not Mr. Owens has anything to present first.

MR. OWENS: No, if Your Honor please.

THE COURT: All right. Now, I can save you some time on applying to the Supreme Court for Certiorari, that is no longer required. The only question is whether there is any remedy through Habeas Corpus proceeding, I mean whether an application to the Court of Criminal Appeals through Habeas Corpus Application, I mean through Habeas Corpus would serve any purpose.

MR. PETTY: All right. The cases on that point, Your Honor, I think make it clear that to be an affective remedy or available remedy within the meaning of Section 24—2254 of Title 28 of the United States Code makes clear that that purported remedy not merely be a procedure or not merely be a futile effort on the part of the [fol. 60] petitioner. In other words, if his efforts of attempting to obtain a Writ of Habeas Corpus in The State Court, that it's plain to see that that would be a futile and useless effort, then he has no need to go through that pro-

cedure, to go through the motion. The purpose of this requirement of exhaustion of State remedies is to give the State the first opportunity to judge a particular person's allegations that his rights have been violated. The purpose is not to throw stumbling blocks or to make the going in Federal Court tougher. It's just to give the State the first opportunity. If they have had that opportunity you need not pursue an alternate procedure to give them that opportunity again.

As Mr. Barber stated on the stand when his appeal was presented to The Oklahoma Court of Criminal Appeals he raised the question in his brief to that Court that his Constitutional Rights to be confronted with witnesses against him had been violated. The Court had that matter before them, Mr. Barber knew about it, his attorney knew it when they presented that appeal. The Oklahoma Court of Criminal Appeals rendered a decision against him.

Now, there is a very recent case in The Oklahoma Bar Journal, Hampton vs. Page, and the only citation is to the Bar Journal. It's 37 O.B.A.J. 577, March 19, 1966. When this case was decided—

THE COURT: Five seventy-seven (577)?

[fol. 61] MR. PETTY: Yes, sir.

THE COURT: Thirty-seven (37) Oklahoma Bar Journal, 577?

MR. PETTY: Your Honor, I have a memorandum brief on these points that may be of aid, I have another copy.

THE COURT: May I have this?

MR. PETTY: Yes, sir. In that Hampton case, Your Honor, the Court of Criminal Appeals makes it clear that any attempt by Mr. Barber to obtain a Writ of Habeas Corpus from that Court would be futile and useless. In syllabus one the Court stated, "Where petitioner has appealed from judgment of conviction, and judgment of conviction has been affirmed, and questions raised in Habeas Corpus proceedings were in existence and known to petitioner at time of appeal, and were matters which properly should have been presented by appeal, Court of Criminal Appeals will not issue Writ of Habeas Corpus."

THE COURT: Now, we go a little bit further in this one, don't we? We have here the exact question was, in fact, considered on appeal, is that right?

MR. PETTY: Yes, sir, that's right. All it would do, all that would be accomplished by requiring the petitioner to go back to the Court of Criminal Appeals for a Writ of Habeas Corpus would be a consumption of time by making him go through the motion of a procedure that could have no possibility of any relief for Mr. Barber. [fol. 62] On page three of this memorandum that I have cited to the Court, the Fourth Circuit Court, United States Circuit Court for the Fourth Circuit in a 1960 decision, Grundler vs. The State, I have quoted a portion from that case. In that case it was stated, and in that case they quoted a United States Supreme Court opinion, "If a question is presented and adjudicated by the state's highest court once, it is not necessary to urge it upon them a second time under an alternate procedure." This was expressly held in the Brown case, which is a United States Supreme Court case. That is exactly our situation here. We have presented it once and the petitioner shouldn't be required to present it by an alternate procedure.

THE COURT: And the latter part of your brief relates to this matter of certiorari?

MR. PETTY: Yes, sir, I have cited authorities to the effect that a petition to the United States Supreme Court for review of certiorari is no longer necessary. I thought, perhaps, also it might be contended that the petitioner might have some relief under the new post appeal act in Oklahoma, but that remedy was not available when he began his proceedings, and in the cases that I have set out in order for the remedy to be available it must have been in at the time the initial petition was filed.

THE COURT: I think that is an erroneous conclusion, Mr. Petty. The Supreme Court has held in a case against [fol. 63] Nebraska, I believe, that where a remedy does develop the case will be remanded to give the state an opportunity, but the statute that you have reference to relates to being denied the Constitutional right of appeal. That is not involved here.

MR. PETTY: Yes, sir. In any event it wouldn't be an available remedy.

THE COURT: I agree with you that it's not applicable here.

MR. PETTY: That concludes my presentation, Your Honor. We would request that this Court make a finding that petitioner has exhausted all available State remedies and that his petition for Writ of Habeas Corpus is correctly before this Court.

THE COURT: All right. I will hear from Mr. Owens now.

MR. OWENS: May it please the Court, I don't have any serious quarrel with counsel. I personally would like to see the Tenth Circuit Court go ahead and decide this case. I think we have a good case on its merits. However, I know that this Court wants to comply with the order of the Tenth Circuit so that Court will not have to send this case back again, and likewise so do I want to comply with the order.

As I read that opinion of the Tenth Circuit, on page three, it seems the court is concerned not that this ques-[fol. 64] tion was, or was not presented to the Court of Criminal Appeals, and we know that the question was before the Court and so does the Tenth Circuit Court know. However, the Court says that the issue of confrontation as a Constitutional matter now raised by the petitioner was not presented to or passed on by the State Court as is considered only the issue of whether or not The Oklahoma rule as to absent witnesses has been complied with. As I read the order the Tenth Circuit Court is saying that the Court of Criminal Appeals merely looked to see whether the statutory rule was complied with, whether the State met all the elements. The Court satisfied itself that it did, but the Tenth Circuit is saying that the State did not go further to determine whether the statute itself might be unconsitutional as a deprivation of a right of a defendant to be confronted by witnesses against him. It seems the Court wants the State Court to look at that statute and determine whether it's constitutional. Perhaps the Court of Criminal Appeals would do this by way of petition for Writ of Habeas Corpus.

Again, I have no quarrel with counsel, except I don't see how the petitioner can be harmed by filing a petition for Writ of Habeas Corpus with the Court of Criminal

Appeals presenting the question of whether that statute is constitutional.

THE COURT: Well, the time, of course, that it takes is the only real—

MR. OWENS: Yes. I think the Court of Criminal [fol. 65] Appeals has determined the question and would determine a petition adversely against this petitioner, but I cannot presume to speak for the Court.

THE COURT: Let me hear from Mr. Petty on this point, will you please?

MR. PETTY: Your Honor, I think the opinion of the Tenth Circuit makes it clear that the only question that this Court is to decide is whether or not the petitioner had exhausted his remedies in the State Court. Now, as to this question of whether or not the statute, the Oklahoma Statute is constitutional, I didn't get the impression at all that the Tenth Circuit was trying to tell the Oklahoma Court to make a constitutional determination, or rather a determination whether that statute was constitutional.

Now, petitioner has testified, and in his brief, and I think I set it out in the brief I sent to the Court, and the brief to the Court of Criminal Appeals his contention of his right to be confronted with witnesses against him was violated. The Oklahoma Court of Criminal Appeals had this matter before them. Now, the fact that they didn't say anything about it is not petitioner's fault. I think there are Federal cases to that affect that there is no way petitioner can compel an Appellent Court to make a specific finding on every point he raises. It is his obligation to raise the points and once that point having been raised [fol. 66] his obligation is satisfied.

THE COURT: Well, if I didn't have this opinion in front of me I would be disposed to agree with you, Mr. Petty. I should think that if the petitioner raised the issue of the constitutionality or denial of his constitutional rights to be confronted with witnesses on appeal and the Court of Appeals ignored it, then, it would constitute a rejection of his position. And certainly I hage to see the time it will take, when I think you and I both agree it will probably take, unless there is a change on the part of

the Court of Criminal Appeals in these matters, will be a foregone conclusion, the denial of his application for a Writ of Habeas Corpus. But, the Court of Appeals, as Mr. Owens pointed out, says that the issue of confrontation as a constitutional matter now raised by the petitioner was not presented to the Court of Appeals. Now, it's your contention that it was presented.

MR. PETTY: Yes, sir.

THE COURT: But they find differently. Now, what the basis for that finding is, I don't know. I have got to accept their finding in the matter.

MR. PETTY: Your Honor, I have a copy of the brief that petitioner filed in the Court of Criminal Appeals where this point was raised. I would be happy to put him back on the witness stand, if you think that would help any, but I think it established that this matter was, in [fol. 67] fact, raised, and I think the Circuit Court is the Court that makes the factual determination, and I think that probably would carry some weight with the Circuit Court.

THE COURT: Well, if the matter of presenting it to the Court of Criminal Appeals were controlling I think it might be advisable to do it.

MR. PETTY: There are cases to that effect that I didn't cite in this brief because I didn't feel it was necessary, that question hadn't been raised.

THE COURT: It considered only the issue of whether or not the Oklahoma rule as to the absent witness had been complied with. There is a further matter that none of us seems to have paid much attention to and that relates to the examination by the—the opinion of the Oklahoma Court recites that the attorney for the petitioner cross-examined the witness Woods during the course of the preliminary hearing. This did not occur, as the State now concedes. The decision by the Oklahoma Court of Criminal Appeals was handed down prior to the decision of Farmer against Texas, that is the case that held where testimony was taken at a preliminary hearing and was used against an individual that it was a critical stage of the proceedings. Now, what you are doing, they went ahead to say that no showing was made on this point, that is on exhaustion of State remedies.

MR. PETTY: Yes, sir.

[fol. 68] THE COURT: And, of course, there was no finding on this point.

MR. PETTY: I might mention, Your Honor, that Judge Bohanon in his initial statements at this first hearing of this case, in his preliminary statements to the petitioner and counsel, made the statement that petitioner had exhausted his State remedies but that was the only statement in the record, there was no testimony to that affect nor apparently any presentation made to him on that point.

THE COURT: Well, I would like very much to hold that Mr. Barber had exhausted his State remedies and let the Court of Appeals go ahead and get this matter decided on its merits. I have a very strong feeling that if I do it is going to prove in the end a good deal more wasteful in time than it would if he would go ahead and file an application for a Writ of Habeas Corpus with the Court of Criminal Appeals.

MR. PETTY: If it would be—

THE COURT: And get it out of the way.

MR. PETTY: If it would be helpful to Your Honor I would be happy to file an addition to this brief that I have supplied this morning to the affect that the petitioner's only obligation is to raise the question, to put the question forth, and, of course, once he does that and there is a ruling in the case the matter has been considered.

THE COURT: How do you overcome this, what testi-

[fol. 69] mony or evidence have you got that this issue of confrontation as a constitutional matter was not presented to the State Court? Do you know what they base that statement on?

MR. PETTY: No, sir, Your Honor, I don't. I have a copy of this petitioner's brief filed in the State Court where that question was raised.

THE COURT: Do you think I would be well advised to find that the Court of Appeals is wrong in its finding in that regard?

MR. PETTY: Well, I am not sure, I don't think the Court of Appeals intended that statement as a finding of fact.

THE COURT: Well, I am going to give you—what have you got that would show me that it was, in fact, presented to the Court of Criminal Appeals?

MR. PETTY: I have a copy of the petitioner's brief.

THE COURT: Does it contain a reference to the record or something of that character? I am not talking about presenting it to the Court of Appeals, I am talking about the Criminal Court of Appeals, the State Court.

MR. PETTY: Yes, that is the one I am referring to.

THE COURT: You mean you have a copy of the brief that was before the State Court?

MR. PETTY: Yes, sir.

THE COURT: Well, I think it might be a good idea, if you think this is determinitive. What about the Peti- [fol. 70] tion that was filed in the Criminal Court setting out the issues, do you have that? In other words, was this issue raised for the first time in the brief or was it made a basic part of the appeal?

MR. PETTY: Your Honor, all I have is a copy of the brief.

THE COURT: Why don't you introduce it in evidence, then, if Mr. Owens has no objection.

MR. PETTY: May we have a stipulation that this is admissable, Mr. Owens?

MR. OWENS: Yes.

THE COURT: You want to introduce in evidence as Exhibit No. 2 a copy of the brief?

MR. PETTY: Before the Court of Criminal Appeals for the State of Oklahoma.

THE COURT: All right, without objection it may be admitted.

MR. PETTY: The objection, Your Honor, begins at page four of that brief, down at the bottom of that page, and I think it continues through about page 10.

THE COURT: "The State, over the continuous and strenuous objection of the defendant was allowed to introduce the testimony of Charles Henry Woods, the State's key witness, by transcript taken at the preliminary hearing. We contend that the Court committed reversible [fol. 71] error in allowing said testimony to be introduced by transcript."

Well, that is a reversible error under the State law. Where does it refer to the use of the testimony as a constitutional violation?

MR. PETTY: On over, I think, about page 10, nine or 10. The reference by Mr. Barber's attorney in that brief is to the provision in the Oklahoma Constitution to the right of confrontation of witnesses, which is identical to the constitutional provision of the United States Constitution.

THE COURT: Well, it will take a closer reading of this than I can make now. I will look at it later to determine whether the brief supports your contention.

Now, that is all that you have to support your position that actually the matter was presented for review to the Court of Criminal Appeals?

MR. PETTY: One other thing occurs to me, Your Honor, and I don't recall without looking, but I have the opinion of the Court of Appeals with me, and I don't recall specifically but I think they make mention of that point in their decision.

THE COURT: Well, do you want to introduce a copy of the opinion? I am sure Mr. Owens doesn't have any objection.

MR. OWENS: No, I have none.

MR. PETTY: Yes, Your Honor, I would.

THE COURT: Offer it as Petitioner's Exhibit No. 3, then. The opinion which has been marked as Exhibit 3 [fol. 72] will be admitted without objection.

I think that I will wait and read the opinion separately, too.

Now, is that all you have?

MR. PETTY: This is all we have, Your Honor.

THE COURT: Mr. Owens, do you have anything that would be helpful in determining if I should overrule the Court of Appeals in this matter?

MR. OWENS: Your Honor, I only have the copy of the opinion and the Court of Criminal Appeals Decision.

THE COURT: The matter that is covered in the brief has to have been made an issue with the Court of Criminal Appeals on the application, doesn't it, on the petition for review in the Court of Criminal Appeals?

MR. OWENS: Yes, Your Honor. Usually the Court only considers things raised in the brief unless some fundamental error is obvious.

THE COURT: Are they required to set out the issues any previous time other than notice of appeal?

MR. OWENS: Only some general positions are set out in the Petition in Error, Your Honor, those are usually a statement that errors of law were committed and errors of fact.

THE COURT: There is no specific statements of the issues which has the effect of confining you to those issues the way we have in the Federal jurisdiction?

[fol. 73] MR. OWENS: No, Your Honor, there is not. I have one observation, Your Honor, if I may.

THE COURT: All right.

MR. OWENS: Again I'm not quarreling with this, and again I think we are ignoring that part of the order passed on by the State Court. The fact they were raised in the brief does not appear to be controlling here. I personally think that what the Court wants is a petition for the Writ of Habeas Corpus in the nature of a Petition for Re-hearing stating to the Court that although you have ruled on this question we submit that you have overlooked this point. Although you have said that the statute was complied with we submit that you have not passed on the constitutionality of the statute.

THE COURT: I think you are right that that is the determination that has to be made. I will examine the brief and I will examine the opinion carefully. I will tell you this, Mr. Petty, unless it's clear the State Court did have the matter before them, and that it was not overlooked, then, I think under the order of the Court of Appeals I have no alternative but to require, if the petitioner is to proceed further here, that he exhaust his State remedies by making an application on these points for a Writ of Habeas Corpus to the Court of Criminal Appeals. I am just as anxious as the rest of you, though, to avoid a use-

[fol. 74] less requirement, and if I find, incidentally, that he has not exhausted his State remedies, and I want it to be clear for the record, that this matter has been taken up and the Court of Appeals has been given an opportunity to rule on it, if I find that that has not been done I

have no alternative than to order the Petition dismissed for the reason he has failed to exhaust State remedies, and unless that is done the Court has no jurisdiction. It is actually a fundamental jurisdiction question. But, we shall see. If it is there it rests where you suggest, in the brief and in the opinion, isn't that correct?

MR. PETTY: Yes, sir, that is right.

THE COURT: And we have Mr. Barber's testimony as to what he actually did. It's not clear to me from the opinion entirely whether they couldn't tell whether he filed an application for a Writ of Habeas Corpus or not, but the record is clear he has not, it's solely a question of whether or not the constitutional question has been considered.

Do you want to submit a brief on this matter of presentation?

MR. PETTY: Your Honor, to you?

THE COURT: Yes.

MR. PETTY: Yes, sir, I certainly will.

THE COURT: Well, how soon could you get it in?

MR. PETTY: Would 20 days be excessive? The reason I ask, I am involved right now in a brief with the [fol. 75] Tenth Circuit.

THE COURT: What is today, the 13th?

MR. PETTY: Yes, sir.

THE COURT: I will give you until the 9th of May. Mr. Owens, if you want to submit any kind of a brief I will ask you to do so simultaneously, I don't want to delay the matter any more than we have to in arriving at a decision here. In the brief that Mr. Petty wants to submit it relates to whether there was a showing that there had been a presentation of the issue to the State Court and the State Court doesn't pass on it it constitutes a rejection of that proposition. Now, isn't that it, Mr. Petty?

MR. PETTY: Yes.

THE COURT: If you feel that is not the case and want to present any authorities to me, do so by the 9th of May.

MR. OWENS: Yes, Your Honor.

THE COURT: All right. Anything further to come before the Court in this case?

MR. PETTY: No, Your Honor.
MR. OWENS: No.

[fol. 76]

CERTIFIED A TRUE TRANSCRIPT

/s/ Stephen D. Allen
STEPHEN D. ALLEN
Official Court Reporter
United States District Court for the
Eastern District of Oklahoma

[fol. 79] CERTIFICATE OF CLERK

UNITED STATES OF AMERICA:

ss

EASTERN DISTRICT OF OKLAHOMA:

I, JOHN B. FINK, Clerk of the United States District Court, in and for the Eastern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and correct copy of the original pleadings and proceedings in 5676 Civil; Jack Allen Barber, Plaintiff, vs. State of Oklahoma, Defendant, and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of the aforesaid court at Muskogee, Oklahoma, this 19 day of August 1966.

JOHN B. FINK
Clerk, U. S. District Court

By: Lewis Vaughn
Chief Deputy Clerk

[SEAL]

Filed, United States Court of Appeals, Tenth Circuit
Aug. 26, 1966, Robert B. Cartwright, Clerk

[fol. 80] Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit at the various terms in 1966 and 1967.

Order granting appellant leave to appeal in forma pauperis

Thirtieth Day, July Term, Friday, August 26th, 1966.

Before Honorable Alfred P. Murrah, Chief Judge.

On application of appellant, and for good cause shown, it is ordered that appellant may docket this cause instanter, which is accordingly done, and prosecute the appeal without being required to prepay fees or costs or to give security therefor, and that the appeal may be considered upon a certified typewritten transcript of the record and typewritten copies of appellant's brief.

It now appearing that the appellant is a poor person and unable to employ counsel, it is further ordered that C. E. Barnes, Esquire, be and he is hereby designated and assigned as counsel for appellant to prosecute the appeal in this cause.

(A copy of the transcript of record is incorporated herein and made a part hereof by reference.)

[fol. 81] And thereafter the following proceedings were had in the United States Court of Appeals for the Tenth Circuit.

Order: Cause argued and submitted.

Third Day, November Term, Wednesday, November 16th, 1966.

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard and was argued by counsel, C. E. Barnes, Esquire, appearing for appellant, Charles L. Owens, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

[fol. 82]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9015 - November Term, 1966

Filed, United States Court of Appeals, Tenth Circuit
Dec. 30, 1966, Robert B. Cartwright, Clerk

JACK ALLEN BARBER, APPELLANT

v.

RAY H. PAGE, WARDEN, APPELLEE

Appeal from the United States District Court for the Eastern District of Oklahoma

---

C. E. Barnes for Appellant.

Charles L. Owen, Assistant Attorney General (Charles Nesbitt, Attorney General of Oklahoma, was with him on the brief), for Appellee.

Before BREITENSTEIN and ALDRICH*, Circuit Judges, and KERR, District Judge.

BREITENSTEIN, Circuit Judge.

[fol. 83] OPINION

For the second time, appellant appeals from a judgment denying him, a state prisoner, habeas corpus relief. In Barber v. Page, 10 Cir., 355 F.2d 171, we remanded because the record did not show that appellant had exhausted his state remedies. The district court held a second evidentiary hearing, found that the state remedies had in fact been exhausted, and denied relief.

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* Sitting by designation.

The only point for consideration is whether the appellant was denied his Sixth Amendment right to be confronted by the witnesses against him. He, an individual named Woods, and at least one other were charged with robbery. At a preliminary hearing, an attorney named Parks was retained to represent both appellant and Woods. Woods was called to the stand. The attorney advised him of his right to claim the privilege against self-incrimination. After a recess, the attorney requested, and was granted, leave to withdraw as attorney for Woods. In the presence of appellant and his attorney, Woods testified and incriminated the appellant. He was not cross-examined [fol. 84] by appellant's attorney, Parks, but was by the attorney for other accused.

At the trial, a transcript of Woods' testimony at the preliminary hearing was received in evidence over appellant's objections. Appellant was convicted and the judgment was affirmed by the Oklahoma Court of Criminal Appeals. Barber v. State, —— Okl.Cr. ——, 388 P.2d 320. Woods was not present at the trial because he was then an inmate of a federal penal institution located in Texas. In the circumstances presented Oklahoma permits a transcript of the testimony to be used at the trial. Id. at 324.

Pointer v. Texas, 380 U.S. 400, 403-406, holds that the right of confrontation includes the right of cross-examination and is binding on the states. In that case, the transcribed testimony of the out-of-state witness was taken in a preliminary examination where the accused was not represented by counsel.

[fol. 85] Appellant says that the state was not diligent in securing the attendance of Woods at the trial. He was not subject to Oklahoma process. Although an application could have been made to a federal court for a writ of habeas corpus ad testificandum, the grant of such a writ is discretionary. Gilmore v. United States, 10 Cir., 129 F.2d 199, 202. In our opinion a state is not required to ask a federal court for a discretionary writ and have it denied before the state can use a transcript of the testimony of an out-of-state witness. This is not a case like Motes v. United States, 178 U.S. 458, 471, where

the witness had escaped through the negligence of the government. Pointer was decided on the denial of confrontation—not on the use of the transcribed testimony of an out-of-state witness.

In the case at bar the accused had retained counsel present at the preliminary hearing and counsel had an [fol. 86] opportunity to cross-examine. Failure to exercise the right of cross-examination is no ground for asserting denial of the right of confrontation. We are not impressed with the contention that the attorney was in a doubtful position because of his previous representation of Woods. He had withdrawn and his obligation was to the appellant, who must have been satisfied because we note that he was represented by the same attorney on his appeal to the Oklahoma Court of Criminal Appeals. The appellant's belated attempt to inject ethical considerations of the attorney-client relationship into the case does not entitle him to federal habeas relief.

Affirmed.

[fol. 87] ALDRICH, Circuit Judge, dissenting.

No question of fact is involved in this case, but an important Constitutional issue. The right of confrontation, although but recently imposed upon the states, is an old and valuable right. Kirby v. United States, 1899, 174 U.S. 47. I do not take it that the extension by Pointer v. Texas, 1965, 380 U.S. 400, was only half-hearted; we must be guided fully by the Supreme Court decisions. The esteem in which the Court holds this right is illustrated by its recent case of Parker v. Gladden, —— U.S. ——, 12/12/6. Cf. Brookhart v. Janis, 1966, 384 U.S. 1.

In situations of necessity, the importance of the public interest may qualify the right of a defendant to be condemned by a witness the jury can see and appraise. This must mean, however, a real necessity, not a token one. Motes v. United States, 1900, 178 U.S. 458, clearly holds that mere unavailability of a witness is not enough; if the prosecution wants to use a witness's prior testimony it first has a duty to try to produce him. Were

[fol. 88] there no such duty, the Court could not have relied on the negligence involved in the government's failure to have the witness in that case. The significance of Motes is pointed up by the fact that there, unlike the present case, the defendant had cross-examined the witness on the prior occasion. Nonetheless, the Court found a denial of confrontation.

Although my brethren use the word "diligent," I do not see how a state can be said to be diligent when it made no effort whatever. While the federal authorities, in their discretion, could have refused to let the witness be taken 226 miles. it would seem an unusual case in which the application for such a writ could be properly denied. In any event, the possibility of a refusal is not the equivalent of asking and receiving a rebuff. While I am not happy about the court's somewhat offhand dismissal of the reasons petitioner's counsel may have had for not cross-examining his former client at the preliminary hearing, I am more than unhappy to see confrontation dispensed with because the state did not choose to seek it.

[fol. 89] JUDGMENT

Thirty-Third Day, November Term, Friday, December 30, 1966.

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

[fol. 90]

PETITION FOR REHEARING

JUDGES BREITENSTEIN, ALDRICH & KERR

Vocational Training School

RAY H. PAGE, WARDEN — CLINT J. GLADDEN, DEPUTY WARDEN — LEE C. JOHNSON SUPERVISOR — PARK ANDERSON, ASST. DEPUTY WARDEN — MACK H. ALFORD, CAPTAIN

Inmate's No. 67027
Name Jack A Barber
To U.S. Court of Appeals
Relation Business
R. F. D. or Street No.
City Denver
State Colorado 80202

RULES FOR WRITING AND VISITING

All inmate mail is opened, censored and recorded by OFFICIALS. Inmates are permitted to receive one letter per day from persons on their mailing list. No incoming letters shall exceed four pages or contain a letter from another person. Sign with your full name. Write plainly regarding buisness or family matters only. Address letters to: Inmate's Name, his Number, P. O. Box 128, Stringtown, Oklahoma—74569.

ARTICLES INMATES MAY RECEIVE: News-papers and books of proper character direct from publishers, shoes, socks, underwear and handkerchiefs, table model radios, small fans and family photos. Nothing else unless advance permission has been obtained through the Capt.'s Office. SEND, DO NOT BRING TO INSTITUTION. Do not put old or new letters in packages. In sending money to inmates, send money orders (Postal or Railway Express) or cashiers checks, DO NOT SEND CASH OR STAMPS.

TRAINING SCHOOL INMATES: will receive visitors ONLY on SATURDAY AFTERNOONS: between the hours of 12:30 and 4:00 P.M., SUNDAYS from 8.30 A. M. to 4:00 P.M.

LETTERS INCOMING AND OUTGOING MUST BE SIGNED WITH FULL NAME OF WRITER.

P. O. Box 128
Stringtown, Okla.—74569 Jan. 18 1967

Via Certified Mail

United States Court of Appeals
Tenth Circuit

JAN 30 1967

William L. Whittaker
Clerk

In Re: No. 9015, Jack Allen Barber, appellant, vs. Ray H. Page, Warden, respondent.

May It Please The Court:

On December 30, 1966 the Court handed down its opinion in the above referred case, denying habeas corpus ac coram nobis.

Please be advised that as the appellant in this case, I do not agree with the Court in its opinion, nor am I satisfied that justice has been done. Therefore, it is my sincere and humble desire to pursue this matter further, either by requesting a rehearing before the entire Court, or by prosecuting an appeal for certiorari to the United States Supreme Court.

Mr. C. E. Barnes, of Oklahoma City, Oklahoma was appointed by the Court to represent this case on appeal. I sincerely believe that Mr. Barnes has done a remarkable

Vocational Training School

RAY H. PAGE, WARDEN
CLINT J. GLADDEN, DEPUTY WARDEN
LEE C. JOHNSON SUPERVISOR
PARK ANDERSON, ASST. DEPUTY WARDEN
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Inmate's No. 67027
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City (Cont'd page two)
State

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LETTERS INCOMING AND OUTGOING MUST BE SIGNED WITH FULL NAME OF WRITER.

P. O. Box 128
Stringtown, Okla.—74569 Jan. 18, 196

Job, despite the fact that he has not practiced criminal law in the past twenty years, prior to this appointment. I must assume that Mr. Barnes has now fulfilled his obligation to this case. Therefore, I am requesting the Court to appoint other counsel, and respectfully suggest that such counsel reside or practice law in Washington, D. C., in the event an application for certiorari to the United States Supreme Court is made. Also, as the appellant in this case, I further request an extension of time which will permit such counsel to prepare and file any necessary action relative to the instant cause, and includes proceeding in forma pauperis.

Respectfully Submitted,

Jack Allen Barber

Jack Allen Barber
#67027

CC: Mr. C. E. Barnes,
Attorney At Law,
Hightower Building,
Oklahoma City, Okla. 73102

[fol. 92]

Order denying petition for rehearing en banc

Seventh Day, March Term, Friday, March 24th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing en banc herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing en banc be and the same is hereby denied.

Order denying petition for rehearing

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On April 4, 1967, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the Eastern District of Oklahoma.]

[fol. 93] Clerk's Certificate

United States Court of Appeals, Tenth Circuit.

I, William L. Whittaker, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the United States District Court for the Eastern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 9015, wherein Jack Allen Barber was appellant and the State of Oklahoma was appellee.

I do further certify that the original files filed herein remained on file herein until April 4, 1967, at which said time the said original files were returned to the United States District Court for the Eastern District of Oklahoma.

In testimony whereof, I hereunto subscribed my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 10th day of April, 1967.

[SEAL]

/s/ William L. Whittaker
Clerk of the United States Court
of Appeals, Tenth Circuit.

[fol. 94]

SUPREME COURT OF THE UNITED STATES

No. 55 Misc., October Term, 1967

JACK ALLEN BARBER, PETITIONER

v.

RAY H. PAGE, WARDEN

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 703 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 9, 1967

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 286372 531

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,

Petitioner,

v.

RAY H. PAGE, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

IRA C. ROTHGERBER, JR.
Counsel for Petitioner
2910 Security Life Building
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INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Applicable Constitutional Provisions and Statutes	2
Questions Presented	3
Statement of the Case	3
ARGUMENT:	
I. The Right of Confrontation Provided in the Sixth Amendment Is the Right to Be Confronted Before the Trier of the Facts	5
II. Under the Circumstances of This Case, Failure of Counsel to Cross-Examine the Co-Defendant Witness Was Not Waiver of the Right of Confrontation	10
III. Petitioner Was Deprived of Effective Assistance of Counsel	12
IV. Whether or Not the Exceptions to the Hearsay Rule Are Engrafted Upon the Constitutional Right of Confrontation in This Case There Was Not an Adequate Foundation Laid for Introduction of the Transcript of Testimony at the Preliminary Hearing	14
Conclusion	20
APPENDIX A—Letter to Petitioner dated September 6, 1967	21

TABLE OF CASES CITED

Barber v. *Page*, 355 F.2d 171 (10th Cir., 1966) ..1, 3, 4, 5
Barber v. *Page*, 381 F.2d 479 (10th Cir., 1966) 1, 16
Barber v. *State of Oklahoma*, 388 P.2d 320 (1963) 1, 3, 4

Page

Bird v. *State of Oklahoma*, 362 P.2d 117 (1961) 15
Brookhart v. *Janis*, 384 U.S. 1 (1966) 10, 11, 12
Burgett v. *State of Texas*, #53 OT 1967, —— U.S. ——, 36 USLW 4014 (1967) 5

Douglas v. *Alabama*, 380 U.S. 415 (1965) 5, 20

Glasser v. *United States*, 315 U.S. 60 (1942) 12, 13
Government of Virgin Islands v. *Aquino* and *Government of Virgin Islands* v. *Reyes*, 378 F.2d 540 (3rd Cir., 1966) 7, 9, 18, 19
Government of Virgin Islands v. *Lovell*, 378 F.2d 799 (3rd Cir., 1967) 19

Holman v. *Washington*, 364 F.2d 618 (5th Cir., 1966) 17, 19

Mattox v. *United States*, 156 U.S. 237 (1895) 6, 7
Motes v. *United States*, 178 U.S. 458 (1900) 16, 17

Parker v. *Gladden*, 385 U.S. 363 (1966) 6
Pointer v. *Texas*, 380 U.S. 400 (1965) 5, 8, 9, 10, 19, 20

Saied v. *State of Oklahoma*, 83 P.2d 605 (1938) 16, 19

von Moltke v. *Gillies*, 332 U.S. 708 (1948) 12, 14

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Sixth Amendment ..2, 3, 5, 7, 9, 13, 19, 20
28 U.S.C. 1254(1) 2
28 U.S.C. 2241(c)(1) 2
Article II, Section 20, Constitution of Oklahoma .. 16
Title 22, Section 13, Oklahoma Statutes Annotated 16

MISCELLANEOUS

"Preserving the Right to Confrontation—a New Approach to Hearsay Evidence in Criminal Trials," 113 U. of Pa. L. Rev. 741 (1965) 15
V *Wigmore on Evidence*, 3d ed., 1940, §1395 7
V *Wigmore on Evidence*, 3d ed., 1940, §1397 .....6, 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,

Petitioner,

v.

RAY H. PAGE, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

Opinions Below

The opinion of the District Court of Tulsa County, Oklahoma was not reported. The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported in 388 P.2d 320 (A. 28-41). The opinions of the United States Court of Appeals for the Tenth Circuit are reported at 355 F.2d 171 (1966), and 381 F.2d 479 (1966) (A. 60-63), respectively.

Jurisdiction

The last judgment of the Court of Appeals was entered December 30, 1966 (A. 63). Rehearing was denied March 24, 1967. The date of filing the Petition for Writ of Certiorari was April 24, 1967. *Certiorari* was granted October 9, 1967. The time for filing this brief was extended to January 15, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Applicable Constitutional Provisions and Statutes

(1) The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

(2) 28 U.S.C., Section 2241(c)(1):

> "Writ of Habeas Corpus is available to a prisoner of a state institution who is in custody in violation of the Constitution of the United States."

Questions Presented

Was Petitioner unconstitutionally denied his right to be confronted by a witness against him and his right to have effective assistance of counsel?

Statement of the Case

Petitioner was convicted of robbery with firearms in the District Court of Tulsa County, Oklahoma. At a preliminary hearing on August 22, 1961 (A. 33) one Woods, who was jointly charged with Petitioner, testified inculpating Petitioner. At the preliminary hearing, an attorney named Parks was retained to represent both Petitioner and Woods. Woods was called to the stand. Parks advised Woods of his right to claim the privilege against self-incrimination. Prior to Woods' testimony (*Barber* v. *Page*, 355 F.2d 171), after a recess, Parks requested, and was granted, leave to withdraw as attorney for Woods. In the presence of Petitioner and Parks, Woods testified incriminating Petitioner. Woods was not cross-examined by Parks but was represented by a different attorney for another jointly accused (A. 61).[1]

The information charging Petitioner and his co-defendants is dated August 25, 1961 (A. 33). After trial, on March 19, 1962, Petitioner was sentenced to a term of 15

[1] The opinion of the Court of Criminal Appeals of Oklahoma in *Barber* v. *Oklahoma*, 388 P.2d 320, recites that the attorney for Petitioner cross-examined Woods during the course of the preliminary hearing. This did not occur, as the State conceded before the Court of Appeals for the Tenth Circuit. *Barber* v. *Page*, 355 F.2d 171, at 172.

years. Significantly, although Parks was granted leave to withdraw as counsel for Woods during the preliminary hearing, Parks appeared for Woods in three criminal cases in the United States District Court for the Northern District of Oklahoma, on September 14, 1961, October 5, 1961, and October 6, 1961. This fact was not brought to the attention of the United States Court of Appeals for the Tenth Circuit. There is attached as an Appendix to this brief, a copy of a letter to Petitioner dated September 6, 1967, from the Clerk of the United States District Court for the Northern District of Oklahoma, setting forth the representation of Charles Henry Woods by the attorney Parks on three dates subsequent to Parks' purported withdrawal as counsel for Woods at the preliminary hearing.[2]

At the trial, over Petitioner's objections, a transcript of Woods' testimony at the preliminary hearing was received in evidence (A. 61). Woods was not present at the trial. He was an inmate of a federal penal institution (A. 61; A. 35). The state made no effort to return Woods for the trial (A. 35). The state trial court determined that the state had no duty so to do. The Oklahoma Court of Criminal Appeals affirmed. *Barber* v. *Oklahoma,* 388 P.2d 320 (1963) decided prior to the opinion of this Court in *Pointer* v. *Texas, supra.* (See *Barber* v. *Page,* 355 F.2d 171, at 172.)

Petitioner sought Habeas Corpus in the United States District Court for the Eastern District of Oklahoma. (The Petition was designated "Application for Writ of Error Coram Nobis".) The Petition was denied. The United States Court of Appeals for the Tenth Circuit set aside

[2] Petitioner requests this Court in its supervisory capacity over United States courts to take notice of the contents of the Appendix.

the judgment below and remanded for a determination as to whether or not Petitioner had exhausted his state remedies (A. 3). *Barber* v. *Page,* 355 F.2d 171. On remand, the District Court determined that state remedies had been exhausted (A. 7-8). The Court of Appeals for the Tenth Circuit affirmed, holding that the state was not required to ask a federal court to grant a Writ of Habeas Corpus *ad testificandum* and have its application denied prior to using the transcript of the testimony at the preliminary hearing (A. 60-62 at p. 61). Judge Aldrich dissented (A. 62-63).

ARGUMENT

I.

The Right of Confrontation Provided in the Sixth Amendment Is the Right to Be Confronted Before the Trier of the Facts.

In *Pointer* v. *Texas,* 380 U.S. 400 (1965), the Court held that the privilege of confrontation guaranteed by the Sixth Amendment, and made applicable to the states by the Fourteenth Amendment, was not discharged, and could not be discharged by the use of a transcript of the preliminary hearing, at which petitioner had no lawyer and, therefore, had no opportunity to cross-examine the principal witness against him, who, since the time of the preliminary hearing, had left the state.[3]

On the same day as *Pointer* v. *Texas, supra,* was decided, the Court decided *Douglas* v. *Alabama,* 380 U.S. 415 (1965)

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[3] See *Burgett* v. *Texas,* #53 OT 1967, decided November 13, 1967, —— U.S. ——, 36 USLW 4014.

in which it quoted the following from *Mattox* v. *United States,* 156 U.S. 237, 242-3 (1895):

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony whether he is worthy of belief."

In *Parker* v. *Gladden,* 385 U.S. 363 (1966), the Court said:

> "As we said in Turner v. Louisiana, 379 US 466, 472-473, 13 L ed 2d 424, 428, 429, 85 S Ct 546 (1965), the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation of cross-examination and of counsel."

The constitutional guarantee of confrontation is an evidentiary concept, having its genesis in the hearsay rule.[4] Confrontation affords bifurcated advantages: the first is the opportunity of cross-examination; the second is the personal appearance of the witness. Dean Wigmore describes this as: "the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of *a witness' deportment while testifying* and a certain subjective

[4] V *Wigmore on Evidence,* §1397 (3rd ed., 1940).

moral effect is produced upon the witness." (Emphasis in treatise.) V *Wigmore on Evidence,* 3rd ed., 1940, §1395. Dean Wigmore continues:

> "* * * * It is the witness' presence before the *tribunal* that secures this secondary advantage—which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination."

The Constitution itself makes no provision for exceptions to the right of confrontation before the trier of the facts. *Mattox* v. *United States,* 156 U.S. 237 (1895) engrafted upon the constitutional guarantee the concept that the right of confrontation proclaimed by the Sixth Amendment was to be interpreted in light of the rights acquired through Magna Charta.

The interrelationship between the hearsay rule and the constitutional requirement has recently been discussed by the Court of Appeals for the Third Circuit in *Government of Virgin Islands* v. *Aquino,*[5] 378 F.2d 540, 549 (1967) in the following language:

> "The question remains, however, under what circumstances prior testimony of an absent witness who was subject to cross-examination may be introduced into evidence at a trial. The rule has been long settled that this may be done only where the witness is unavail-

[5] At point IV, we shall show that *Virgin Islands* v. *Aquino* is squarely *contra* to this case.

able at the time of the trial because of his death, insanity, illness, absence beyond the jurisdiction, or because he was kept away by the connivance of the other party. The requirement that such unavailability be shown *exists under the constitutional requirement of confrontation and equally so as a rule of evidence,* since the declarant's testimony ordinarily is inadmissible as hearsay and can be admitted at the subsequent trial only out of necessity as an exception to the hearsay rule. See Motes v. United States, 178 U.S. 458, 20 S.Ct. 993 (1900); Washington v. Holman, 245 F. Supp. 116, 122-123 (M.D. Ala. 1964), aff'd on this point, 364 F.2d 618, 622-624 (5 Cir. 1966)." (Emphasis supplied.)

This case is *Pointer* v. *Texas, supra,* with the single exception that instead of no lawyer at the preliminary hearing, a lawyer retained by petitioner (but also by the co-defendant), during the preliminary hearing withdrew as counsel for petitioner's co-defendant, yet failed to cross-examine the co-defendant he had so recently represented, although that co-defendant gave inculpating testimony against petitioner. While not characterizing the failure to cross-examine the witness co-defendant as waiver of the right to cross-examine, the Court of Appeals stated:

> "In the case at bar the accused had retained counsel present at the preliminary hearing and counsel had an opportunity to cross-examine. Failure to exercise the right of cross-examination is no ground for asserting denial of the right of confrontation" (A. 62).

Under the circumstances of this case, Petitioner was not represented by counsel "who had been given a complete

and adequate opportunity to cross-examine" (*Pointer*, at page 407). At the outset, it must be noted that the preliminary hearing preceded the filing of the information (A. 33). The Sixth Amendment places on parallel and equal bases the right to be informed of the charge, the right of confrontation and the right of assistance of counsel.

Furthermore, when he entered the preliminary hearing, whether or not it was "full-fledged" (*Pointer*, at p. 407), Mr. Parks had two clients. An inescapable inference from the circumstances is that at the commencement of the hearing, Mr. Parks expected that neither of his clients would testify against the other.[6] How could he have prepared for the searching cross-examination he undoubtedly would have subjected Woods to at trial after knowing the charges?

In *Virgin Islands* v. *Aquino, supra,* the Court realistically recognized the difference in cross-examination at preliminary hearing from cross-examination at trial, saying (at page 549 of 378 F.2d):

> "At the preliminary hearing, however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still

[6] Had Mr. Parks known of Woods' change of heart prior to the preliminary hearing, it is fair to assume he would have withdrawn before the hearing commenced.

in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilty beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing."

The Court of Appeals for the Tenth Circuit reads *Pointer* too narrowly in declaring, "Failure to exercise the right of cross-examination is no ground for asserting denial of the right of confrontation" (A. 62).

II.

Under the Circumstances of This Case, Failure of Counsel to Cross-Examine the Co-Defendant Witness Was Not Waiver of the Right of Confrontation.

Nor can failure of Mr. Parks to exercise the right of confrontation be regarded as waiver of that constitutional right.

In *Brookhart* v. *Janis*, 384 U.S. 1 (1966), the Court said:

"* * * There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 US 60, 70-71, 86 L ed 680, 699, 62 S Ct 457, and for a waiver to be effective it must be clearly estab-

> lished that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 US 458, 464, 82 L ed 1461, 1466, 58 S Ct 1019, 146 ALR 357."

The Court then analyzed the facts in that case, and was unable to agree with the Supreme Court of Ohio that the Petitioner there, through counsel, intelligently and knowingly waived his right to cross-examine the witness whose testimony was used to convict him, and stated:

> "* * * Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's express desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. * * *"

If the Court of Appeals had known of the contents of Appendix A to this brief, it is unlikely it would have said:

> "* * * We are not impressed with the contention that the attorney was in a doubtful position because of his previous representation of Woods. * * *" (A. 62)

Instead, it is likely that any Court knowing the circumstances would have examined "* * * the state of petitioner's mind—his understanding and his intention— * * *." (*Brookhart* v. *Janis, supra;* separate opinion of Mr. Justice Harlan, 384 U.S. 9.) The circumstance of the withdrawal of Mr. Parks, the attorney, followed by his fifteen-day subsequent representation of the witness co-defendant Woods in the United States Courts, strongly suggests that

if Petitioner had been aware of the limited or restricted nature of the withdrawal, he would not intentionally have relinquished or abandoned the right of cross-examination of this very material witness. Surely Petitioner should not be charged with intentional relinquishment of the valuable right to have a trial in which he could confront and cross-examine the witnesses against him through *independent* counsel.

When considered in light of the dubious circumstances revealed in the Appendix to this brief and discussed in point III, *post*, the failure of Parks to cross-examine his erstwhile client, Woods, in behalf of Petitioner becomes even less acceptable as valid waiver of Petitioner's constitutional right of confrontation.

III.

Petitioner Was Deprived of Effective Assistance of Counsel.

The Court of Appeals, and, indeed, none of the courts which have considered this case, have faced this issue squarely. Waiver of the constitutional right of confrontation would not have occurred, or might not have occurred (see *Brookhart* v. *Janis, supra*) had Petitioner had the "effective" assistance of Mr. Parks. One of the elements of effectiveness is that of independence. *von Moltke* v. *Gillies*, 332 U.S. 708, at 721 (1948), "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Glasser* v. *United States*, 315 U.S. 60 (1942). In *Glasser*, an attorney named Stewart was retained by Glasser and appointed by the court to represent a co-defendant, Kretske.

Glasser explained to the court that there might be a divergence of interest. One Brantman testified, inculpating Kretske. Stewart secured postponement of cross-examination on the ground that he was not prepared to cross-examine in behalf of Kretske. Three days later, Brantman was recalled. Stewart declined cross-examination. The court pointed out that a colloquy between the court and Stewart before sentence was imposed gave rise to an inference that the decision not to cross-examine was influenced by a desire to protect Kretske, lest Brantman's testimony contain "worse lies". The court stated (at page 73) that a thorough cross-examination was indicated in Glasser's interest, and said:

> "Stewart's failure to undertake such a cross-examination luminates the cross-purposes under which he was laboring."

At page 76, the court continued:

> " • • • The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. • • • "

Glasser's conviction was set aside by the court on the ground that Glasser was denied his right to have the effective assistance of counsel.

Thus, once again, the case at bar is but a shade different from one previously decided by this Court. In *Glasser*, counsel retained by one defendant was appointed for another defendant, and the court noted that there was not that untrammeled assistance of independent counsel commanded by the Sixth Amendment.

"* * * Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. * * * " (*von Moltke* v. *Gillies, supra*)

IV.

Whether or Not the Exceptions to the Hearsay Rule Are Engrafted Upon the Constitutional Right of Confrontation in This Case There Was Not an Adequate Foundation Laid for Introduction of the Transcript of Testimony at the Preliminary Hearing.

Dean Wigmore concedes that the "constitution-makers" "did not attempt to enumerate exceptions" [7] to the requirement of confrontation. Without citation of authority, he continues:

> "The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." [8]

This Court has not so held. If the Constitutional guarantee of confrontation is an absolute right, the following discussion is unnecessary.

But assuming the validity of Dean Wigmore's thesis, the constitutional standard for hearsay exceptions requires affording the defendant an adequate substitute for confrontation.

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[7] V *Wigmore on Evidence*, §1397 at page 131 (3rd ed., 1940).

[8] *Ibid.*

> "In the establishment of potential trustworthiness, the mere assumption that a situation minimizes the chance of falsification is not sufficient. Judges may properly consider the rationales of the established exceptions, but should not be bound by them. * * * *And a careful determination of necessity will also insure that apparently trustworthy hearsay will not be admitted when the original declarant could be easily produced.*
>
> Finally, the courts must weigh the importance to the defendant of cross-examination of the declarant on the hearsay statement. When the witness is present at trial, the defendant can force him to clarify ambiguities and explain contradictions in his testimony, while the jury is able to observe his demeanor as a factor in assessing credibility. The defendant should not be denied this opportunity unless the issues that would be probed on cross-examination are not generally significant in the trier of the fact's evaluation of the particular evidence." [9]

The state has or should have a greater burden with respect to proving unavailability than a stipulation that the absent witness is in a federal penitentiary in a neighboring state. Cooperation between state and federal law enforcement officials is common knowledge. But not all cooperation between state and federal enforcement officers is for the benefit of those accused of crime. Oklahoma[10] itself has

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[9] "Preserving the Right to Confrontation—a New Approach to Hearsay Evidence in Criminal Trials", 113 U. of Pa. L. Rev. 741, 748 (notes omitted; emphasis supplied) (1965).

[10] Oklahoma had no direct statute with reference to the introduction of testimony of a witness given upon a former trial or preliminary hearing. *Bird* v. *State*, —— Ok. Cr. ——, 362 P.2d 117, 119 (1961).

shown the danger of countenancing less than diligence as a criterion of unavailability. In *Saied* v. *State,* —— Ok. Cr. App. ——, 83 P.2d 605 (1938), the Court said:

> "• • • To lay down the rule that a mere showing that a resident witness is in another state and that no effort or diligence to produce the witness in open court need be shown might enable public prosecutors and others, if it appeared to their interest, to cause witnesses to absent themselves from the jurisdiction of the court to escape further cross-examination. To say that no diligence is required to produce the witness in open court, where it is possible to do so, is not in keeping with the spirit or the letter of the constitutional guaranty that a defendant in a criminal action has a right to be confronted face to face with the witnesses against him." [11]

The majority opinion below states:

> "In our opinion a state is not required to ask a federal court for a discretionary writ and have it denied before the state can use a transcript of the testimony of an out-of-state witness. This is not a case like Motes v. United States, 178 U.S. 458, 471, 20 S.Ct. 993, 44 L.Ed. 1150, where the witness had escaped through the negligence of the government" (A. 61-62).

This is a misapprehension of the teaching of *Motes,* which emphasizes the constitutional right of confrontation by the

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[11] Article II, Section 20 of the Constitution of Oklahoma provides for confrontation of the accused by witnesses against him. Title 22, Section 13, Oklahoma Statutes Annotated, 1951, provides: "In a criminal action the defendant is entitled: • • • (3) • • • to be confronted with the witnesses against him in the presence of the court."

witness and the right to cross-examine when in the presence of the trier of the facts. (In *Motes* the witness whose testimony was produced by transcript at the subsequent trial had been cross-examined on the prior occasion.) In *Motes,* at page 473 of 178 U.S., the first Mr. Justice Harlan quotes from the opinion of Lord Campbell, C. J., in *Reg.* v. *Scaife,* 2 Den. C.C. 281, 285, 286, S.C. 17 Q.B. 238, 5 Cox, C.C. 243, saying:

> " * * * No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury upon every matter that may be material to his defense. * * * "

Holman v. *Washington,* 364 F.2d 618 (5th Cir., 1966) held that Alabama had made insufficient showing to permit introduction of a transcript of testimony at a former trial based upon the witness' testimony two years before that he lived in South Carolina and a statement that a subpoena had been mailed to the witness in South Carolina. The Court noted that compulsory process is not the only means of securing court attendance (p. 623) and concluded:

> "The constitutional right of confrontation and cross-examination to the extent guaranteed by the Sixth and Fourteenth Amendments cannot be sidestepped because it happens to be convenient for one of the parties. The importance of this right is emphatically demonstrated by the existence of the numerous safeguards designed for its protection."

Only a short while after the Court of Appeals for the Tenth Circuit decided this case, the Court of Appeals for

the Third Circuit reached an opposite result in *Government of the Virgin Islands* v. *Aquino* and *Government of the Virgin Islands* v. *Reyes*, 378 F.2d 540 (1967), in which the court said:

> "• • • It has been widely recognized, however, that in addition to the benefit which a defendant has in testing the reliability of a witness against him by cross-examination, confrontation ordinarily secures a secondary advantage in making it possible for the tribunal before whom the witness appears to judge from his demeanor the credibility of his evidence. This advantage results, not from the confrontation between the witness and the accused, but from the witness' presence before the tribunal. • • •"

and continued, at page 552:

> "• • • The reasonableness of efforts to secure attendance in the Virgin Islands of a witness, whether he is in another state of the Union or in a foreign country, must be judged by the standards of modern air travel and not of the sailing vessel or even the steamship. Where the liberty of a defendant is at stake the government which prosecutes him may not secure the benefit of incriminating testimony against him unless it shows its genuine and bona fide effort to secure the attendance of the witness. An effort which expires at the shoreline of the Virgin Islands cannot be said to have inherently in it the proof of its genuineness and its bona fide character. No effort can be deemed genuine and bona fide which is not reasonable in its extent, and reasonableness must be judged, not by artificial boundaries, but by limitations of time and distance."

To be sure, the United States Government is the prosecutor for the Virgin Islands,[12] but the fundamental protections afforded by the Sixth Amendment to the Constitution of the United States are made applicable to the States, not in part, but in totality, by *Pointer* v. *Texas, supra.*[13] It would avail little to say that the state must permit confrontation, and yet to let the state, itself, define the degree of effort required to satisfy the constitutional mandate.

The very hazard suggested by the Court of Criminal Appeals of Oklahoma in *Saied* v. *State, supra,* that it might be to the interest of public prosecutors to cause witnesses to absent themselves from the jurisdiction of the court to escape further cross-examination might occur, and the constitutional guaranty of confrontation be denied if the casual rule adopted by the Court of Appeals for the Tenth Circuit in this case is permitted to stand. The realistic approach based upon the facts of each case prescribed in the *Government of the Virgin Islands* v. *Aquino, supra,* and *Holman* v. *Washington, supra,* will assure safeguarding the fundamental constitutional right of confrontation, with dual benefits of exclusion of hearsay and an opportunity for the trier of the facts to evaluate the demeanor of the witness.

---

[12] In *Government of the Virgin Islands* v. *Lovell,* 378 F.2d 799, 805 (1967), the Court of Appeals for the Third Circuit, exercising supervisory power, applied 18 U.S.C. §3500 to a Virgin Islands criminal proceeding although the legislature of the Virgin Islands had not acted on the subject of production of documents.

[13] "But of course since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Pointer,* at page 406.

Conclusion

The circumstances of this case warrant reversal of the decision of the Court of Appeals for the Tenth Circuit on the ground that the predicate for the admission of the transcript of testimony at the preliminary hearing was insufficient, and that, therefore, the right of confrontation guaranteed by the Sixth Amendment was denied Petitioner by virtue of the admission of that testimony. To sanction the casual approach to unavailability of witnesses adopted by the Court of Appeals for the Tenth Circuit is to permit the state to arrogate to itself the determination of the criterion under which testimony at a preliminary hearing may be introduced at trial. This is not the direction of *Pointer* v. *Texas, supra,* nor of *Douglas* v. *Alabama, supra,* and it is submitted that such a restriction upon the right of confrontation would render the right meaningless.

While no lower federal court has passed upon the question of denial of assistance of counsel in this case, the facts set forth in Appendix A so cloud the representation of Petitioner by Mr. Parks that, at the very least, the Court should remand the case for hearing as to all of the circumstances surrounding the withdrawal of Mr. Parks, and his failure to examine Woods at the preliminary hearing.

Respectfully submitted,

IRA C. ROTHGERBER, JR.
Counsel for Petitioner
2910 Security Life Building
Denver, Colorado 80202

January 12, 1968

Conclusion

The circumstances of this case warrant reversal of the decision of the Court of Appeals for the Tenth Circuit on the ground that the predicate for the admission of the transcript of testimony at the preliminary hearing was insufficient, and that, therefore, the right of confrontation guaranteed by the Sixth Amendment was denied Petitioner by virtue of the admission of that testimony. To sanction the casual approach to unavailability of witnesses adopted by the Court of Appeals for the Tenth Circuit is to permit the state to arrogate to itself the determination of the criterion under which testimony at a preliminary hearing may be introduced at trial. This is not the direction of *Pointer v. Texas*, *supra*, nor of *Barber v. Alabama*, *supra*, and it is submitted that such a restriction upon the right of confrontation would render the right meaningless.

While no lower federal court has passed upon the question of denial of assistance of counsel in this case, the facts set forth in Appendix A so cloud the representation of Petitioner by Mr. Parks that, at the very least, the Court should remand the case for hearing as to all of the circumstances surrounding the withdrawal of Mr. Parks, and his failure to examine Woods at the preliminary hearing.

Respectfully submitted,

Ira C. Rothgerber, Jr.
Counsel for Petitioner
2910 Security Life Building
Denver, Colorado 80202

January 12, 1968

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
CLERK'S OFFICE
UNITED STATES COURT HOUSE
POST OFFICE BOX 1866
TULSA, OKLAHOMA 74103

NOBLE C. HOOD
CLERK

September 6, 1967

Mr. Jack Allen Barber, 67027
Oklahoma State Penitentiary
P. O. Box 97
McAlester, Oklahoma 74501

Re: Cr. No. 13,744—USA v. Charles H. Woods
Cr. No. 13,745—USA v. Charles H. Woods
Cr. No. 13,746—USA v. Charles H. Woods

Dear Sir:

Pursuant to your request of 9-3-67, I find the above cases, wherein the defendant, Charles Henry Woods, was indicted in this court on 9-7-61, and represented by Ed Parks, attorney.

The record reflects that the defendant appeared in court with counsel on 9-14-61 and entered his pleas of not guilty, and again, on 10-5-61, at which time he withdrew his plea of not guilty and entered a plea of guilty in case Nos. 13,744 and 13,745.

He again appeared in court on 10-6-61 with counsel, at which time sentence was imposed in the two numbered cases, and case No. 13,746 was dismissed on motion of the government.

Yours truly,

/s/ M. M. EWING
Chief Deputy Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,
Petitioner,

vs.

RAY H. PAGE, WARDEN
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

G. T. BLANKENSHIP
Attorney General of Oklahoma

CHARLES L. OWENS
Assistant Attorney General

February, 1968.

King Law Brief COMMERCE EXCHANGE BLDG., OKLAHOMA CITY — CE 5-8869

INDEX

Subject Index

	Page
Statement of the Case	1
Issues	4
Argument	4
I. The sixth amendment's right of an accused to confront the witnesses against him is now held to be obligatory on the states by the fourteenth amendment, and here the state of Oklahoma complied with that obligation by the procedure employed in the trial court.	4
II. The right of an accused to confront the prosecution's witnesses by way of cross-examination may be, and was here, effectively waived by the decision of his counsel not to cross-examine.	9
III. Petitioner had the effective assistance of counsel, notwithstanding the fact that his counsel elected not to cross-examine the prosecution's witness at preliminary hearing.	14
IV. There are exceptions to the constitutional guarantee of confrontation of witnesses ,and in this case adequate foundation was laid to support the introduction of the transcript of testimony at preliminary hearing as a substitute for the appearance of this witness in person	19
Conclusion	22

Table of Cases Cited

Barber v. Page, 381 F.2d 479	1 & 3
Barber v. State, Okl. Cr., 388 P.2d 320	1
Barber v. Page, 355 F.2d 171	3

Page

Boring v. Harber, 130 Okl. 251, 267 P. 252 18

Brookhart v. Janis, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 9

Brown v. State, 9 Okl. Cr. 382, 132 P. 359 18

Butler v. Wilson, 365 F.2d 308 (9th Cir. 1966) 8

Cooper v. United States, 5 F.2d 824 (6th Cir. 1925) ... 17

Dowdell v. United States, 221 U.S. 325 55 L. Ed. 753, 31 S. Ct. 590 6

Fay v. Noia, 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 10

Fransworth v. Sanford, 115 F.2d 375 (5th Cir. 1940), cert. den. 313 U.S. 586, 85 L. Ed. 1941, 61 S. Ct. 1109, reh. den. 314 U.S. 708, 86 L. Ed. 565, 62 S. Ct. 54 18

Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S .Ct. 457 15

Golliher v. United States, 362 F.2d 594 (8th Cir. 1966) 8

Government of Virgin Islands v. Aquino, 378 F.2d 540 (3rd Cir. 1967) ..... 8 & 20

Henry v. Mississippi, 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564 11

Herrea v. Wilson, 364 F.2d 798 (9th Cir. 1966) 8

Hunt v. Blackburn, 128 U.S. 464, 32 L. Ed. 488, 9 S .Ct. 125 17

Johnson v. United States, 380 F.2d 810 (10th Cir. 1967) 15

Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 9

Jones v. People of State of California, 364 F.2d 522 (9th Cir. 1966) 8

Page

Kirby v. United States, 174 U.S. 47, 43 L.Ed. 890, 19 S. Ct. 574 6

Lipscomb v. Stevens, 349 F.2d 997 (6th Cir. 1965), cert. den. 382 U.S. 993, 15 L. Ed. 2d 479, 86 S. Ct. 573 22

Mattox v. United States, 146 U.S. 140, 36 L. Ed. 917 13 S. Ct. 50 6

Mattox v. United States, 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337 ..... 6 & 22

Murray v. United States, 334 F.2d 616 (9th Cir. 1964), cert. den. 380 U.S. 917, 13 L. Ed. 2d 802, 85 S. Ct. 906 22

Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 5

Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 12

Steen v. First Nat. Bank, 298 F. 36 (8th Cir. 1924) 17

Tiger v. Lozier, 124 Okl. 260, 256 P. 727, cert. den. 275 U.S. 496, 72 L. Ed. 392, 48 S. Ct. 117 18

Valentine v. State, 16 Okl. Cr. 76, 194 P. 254 3

Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965) 10

Statutes and Constitutional Provisions

Article 2, Section 20, Oklahoma Constitution 4

22 O. S. 1961 § 13 5

22 O. S. 1961 § 257 7

22 O. S. 1961 § 258 7

22 O. S. 1961 § 259 7

22 O. S. 1961 § 262 8

22 O. S. 1961 § 838 16

12 O. S. 1961 § 385 18

Page

18 U. S. C. § 4001, et seq. 21

18 U. S. C. § 4082 21

18 U. S. C. § 4085 21

Miscellaneous

58 AM. Jur., Witnesses, §§ 460, 522 17

In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,
Petitioner,

vs.

RAY H. PAGE, WARDEN
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The basic facts from which the cause of action now before this Court springs are contained in the opinion of the Oklahoma Court of Criminal Appeals in *Barber v. State,* Okl. Cr., 388 P.2d 320 (A. 28-41), and the decision of the United States Court of Appeals, Tenth Circuit, in *Barber v. Page,* 381 P.2d 479 (A. 60-63). These reflect that the petitioner here, Jack Allen Barber, is a state prisoner who was originally

charged by information in the District Court of Tulsa County, Oklahoma, conjointly with three other defendants, with the crime of robbery with firearms.

At preliminary hearing, before severance was granted for purpose of trial, petitioner and one of his co-defendants, Charles Henry Woods, were both represented by the same retained counsel, one Ed Parks. There having apparently been a previous agreement made between the prosecution and Woods, the prosecution called Woods to testify at this hearing. After advising Woods of his right to claim the privilege against self-incrimination, Parks withdrew as attorney for this defendant and he, Woods, testified and incriminated the petitioner. Woods was not cross-examined by Parks on behalf of petitioner, but he was so cross-examined by the attorney for one of the other defendants.

At trial, a transcript of Woods' testimony at the preliminary hearing was received in evidence and read to the jury over the objection of petitioner's trial counsel, Parks. Woods was not present at this trial, he being at that time an inmate of a federal penitentiary in Texas. Petitioner was found guilty of the crime of robbery with firearms, after former conviction of a felony, and his punishment was assessed at imprisonment in the state penitentiary for a term of fifteen years.

An appeal of this conviction was taken by Parks to the Oklahoma Court of Criminal Appeals. In its opinion rendered in *Barber v. State,* supra, that Court held in that part of the opinion pertinent here (A. 31) that,

> "Where the testimony of the witness was given at the preliminary examination and taken down by the reporter in the presence of the defendant and his counsel, who cross-examined him, and such testimony was filed with the clerk, the transcript is admissible where the witness is not present and cannot be found in the jurisdiction."[1]

After proceeding into the United States District Court for the Eastern District of Oklahoma by way of petition for writ of habeas corpus and being denied relief there, the petitioner appealed that order to the United States Court of Appeals, Tenth Circuit. That Court rendered an opinion in which it remanded the matter to the District Court to determine whether a remedy in the state courts existed whereby the issue might be presented, or whether the petitioner was entitled to proceed in the federal court. See *Barber v. Page*, 355 F.2d 171.

Pursuant to the circuit court's order of remand, the District Court held an evidentiary hearing at McAlester, Oklahoma (A. 42-58), after which the court, being satisfied, that petitioner had exhausted the available state remedies, denied the writ and again granted him leave to appeal to the Circuit Court. That Court subsequently rendered an opinion in *Barber v. Page*, 381 F.2d 479, affirming the District Court's denial

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[1]The Court of Criminal Appeals cited and followed, among other cases, its decision in **Valentine v. State**, 16 Okl. Cr. 76, 194 P. 254, the pertinent syllabus of which provides: "The constitutional provision which guarantees to a defendant the right to be confronted by the witnesses against him is fully complied with when the defendant has had the opportunity to cross-examine the said witnesses in a preliminary trial before a justice of the peace. When this has been done, and upon a subsequent trial of the said cause, if it is satisfactorily proven that such witnesses have, since the former trial, died, become insane, left the state, or that their whereabouts can not with due dilligence be ascertained or are sick and unable to testify, the testimony of such witnesses given upon said former trial may be proven upon the subsequent trial."

of the writ and holding, in effect, that the accused had retained counsel at the preliminary and that counsel had an opportunity to cross-examine. Failure to exercise the right of cross-examination, the Court further held, is no ground for asserting denial of the right of confrontation (A. 62).

This Court granted certiorari in this matter on October 9, 1967 (A. 68), thereby affording the petitioner the opportunity to present the following issues for the Court's consideration.

ISSUES

Whether the petitioner was unconstitutionally denied the right to be confronted by a witness against him and the further right to have the effective assistance of counsel.

ARGUMENT

I

The Sixth Amendment's right of an accused to confront the witnesses against him is now held to be obligatory on the States by the Fourteenth Amendment, and here the State of Oklahoma complied with that obligation by the procedure employed in the trial court.

The State of Oklahoma recognizes that basic right of an accused to confront his accusors. This right is provided constitutionally by Article 2, Section 20 of the Oklahoma Constitution, which provides in relevant part:

> "In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, * * * "

This right is further set out by statute in Oklahoma, specifically 22 O.S. 1961 § 13, which provides in part:

* * *

> "In criminal prosecutions the defendant is entitled:
>
> 3. To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court."

A recognition of that right of an accused is evident in the opinion of the Court of Criminal Appeals in *Barber v. State,* supra, and in the previous holdings of the court which were cited in that case, all validating the procedure of permitting the reading at trial of the testimony of a witness taken at preliminary hearing where proper showing is first made by the prosecution.

This Court has now made it unmistakably clear that the Sixth Amendment's guaranty of the right of an accused to confront the witnsses against him is made obligatory on the states by the Fourteenth Amendment. We are so advised in *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed 2d 923, 85 S. Ct. 1065. The very basic and fundamental nature of this right is perhaps best summarized in the language of the court, speaking through Mr. Justice Black, in *Pointer,* 380 U.S., at 405, 13 L. Ed. 2d, at 927:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

The trial procedure sanctioned by the Oklahoma appellate court in regard to petitioner's trial must, then, be shown to meet with federally-recognized standards relating to confrontation. The respondent submits that said procedure does in fact measure up to these standards, within the full meaning and intent of *Pointer*.

Pointer, we suggest, should be limited to the facts of that particular case. The facts there were that the state, over the defendant's objections, introduced the transcript of the testimony of the prosecuting witness given at the preliminary hearing, at which the defendant was not represented by counsel. This Court has, very probably, already so limited that decision, for it points out that the Court has recognized the admissibility against an accused of dying declarations, citing *Mattox v. United States*, 146 U.S. 140, 36 L. Ed. 917, 13 S. Ct. 50, and of testimony of a deceased witness who has testified at a former trial, citing *Mattox v. United States*, 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337, *Dowdell v. United States*, 221 U.S. 325, 55 L. Ed. 753, 31 S. Ct. 590, and *Kirby v. United States*, 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574. And this very significant language appears in *Pointer* in 380 U.S., at 407, 13 L. Ed. 2d, at 928:

"The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine."

In the case now before the Court, the petitioner was represented by his own retained counsel at preliminary hearing, and it is undisputed that counsel was given a full and complete opportunity to cross-examine the prosecution's witness, although he did not take advantage of this opportunity. Moreover, the opportunity was given at that type "full-fledged" hearing to which this Court referred in *Pointer*. For example, some of the pertinent Oklahoma statutes, or parts of same, relating to preliminary examinations are the following:

22 O.S. 1961 § 257

"At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him. He must, also, after the commencement of the prosecution, issue subpoenas for any witnesses required by the prosecutor or the defendant."

22 O.S. 1961 § 258

"First: The witnesses must be examined in the presence of the defendant, and may be cross-examined by him. * * * "

22 O.S. 1961 § 259

"When the examination of the witnesses on the part of the State is closed, any witnesses the defendant may produce must be sworn and examined."

22 O.S. 1961 § 262

> "After hearing the proofs and the statement of the defendant, if he have one, or his testimony if he testifies if it appear either that a public offense has not been committed, or that a public offense has been committed, but there is not sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged, * * * "

Thus, under Oklahoma's laws petitioner's trial counsel was provided a proper forum and a complete "opportunity" to cross-examine Woods. This is all that *Pointer* requires. It would be illogical to attempt to construe that case to mean that a witness who testifies at preliminary hearing must, in fact, be cross-examined before his testimony can be read later at trial after proper showing that the witness is unavailable to testify. This common-sense meaning of *Pointer* has been adopted by many Federal courts. See *Herrera v. Wilson,* 364 F.2d 798 (9th Cir. 1966), *Jones v. People of State of California,* 364 F.2d 522 (9th Cir. 1966), *Butler v. Wilson,* 365 F.2d 308 (9th Cir. 1966), *Golliher v. United States,* 362 F.2d 594 (8th Cir. 1966), and *Government of Virgin Islands v. Aquino,* 378 F.2d 540 (3rd Cir. 1967).

II

The right of an accused to confront the prosecution's witnesses by way of cross-examination may be, and was here, effectively waived by the decision of his counsel not to cross-examine.

As petitioner correctly notes in his brief, we are advised by this Court in *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, that "A waiver is ordinarily an intentional relinquishment of a known right." But by so holding, this Court simply laid down the reasonable rule that before a defendant can be said to have waived his right to the assistance of counsel at trial, he must know that such right exists and then knowingly and intelligently forego same. Nothing in that opinion indicates that the Court by implication intended that its holding be extended to situations dealing with tactical decisions of counsel at trial. In other words, we suggest that *Zerbst* does not alter the authority of counsel, as manager of his client's lawsuit, to make all decisions relating to strategy, even decisions waiving certain rights of his client, so long as such decisions relate to procedure rather than the merits of the case.

Somewhat closer to the case at bar is the case of *Brookhart v. Janis,* 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245. In that case the attorney for the petitioner agreed that the prosecution need only make a prima facie showing of guilt and that he would neither offer evidence for his client nor cross-examine any of the prosecution's witnesses. During the trial, the petitioner was denied the right to cross-examine any

of the witnesses who testified against him, and the prosecution was permitted to introduce as evidence against him an alleged confession made out of court by one of his co-defendants, who did not testify in court. In reversing that conviction this Court held that the petitioner neither personally waived his constitutional right to confront and cross-examine the witnesses against him, nor did he acquiesce in his attorney's attempted waiver. It is evident, however, that what that opinion really turned on was the fact, as stated by the Court in 384 U.S., at 7, 16 L. Ed. 2d, at 318, that "petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea * *." Again, counsel, through his own independent decision, cannot bind his client by waiving a right which in effect decides his case on its merits.

This same question of waiver was before a Federal court in *Wilson v. Gray,* 345 F.2d 282 (9th Cir. 1965). There the Court held that the right of an accused to cross-examine prosecution witnesses was effectively waived by the action of his counsel in stipulating, in the presence of the accused, to trial without a jury on the transcript of the preliminary hearing. It was the thinking of that Court that such waiver amounted to counsel's exercise of trial strategy and tactics. Much of the reasoning and supporting authorities employed by the Court in *Wilson* will be adopted by the respondent here.

In *Fay v. Noia,* 372 U.S. 391, 9 L. Ed. 837, 83 S. Ct. 822, this Court set down guidelines for determining whether

there has been an effective waiver of a federal constitutional right. The following pertinent language of the Court may be found in 372 U.S., at 439, 9 L. Ed. 2d, at 869:

> "The classic definition of waiver enunciated in Johnson v. Zerbst, (citation)— 'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. * * * At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * * *A choice made by counsel not participated in by the petitioner does not automatically bar relief.*" (Emphasis added)

The Circuit Court in this *Wilson* case reasoned that "Implicit in this statement (the language emphasized above) is the notion that in the proper circumstances counsel for the accused may effectively waive certain rights of the accused during the course of his representation of the accused and as a matter of trial strategy or tactics."

This Court later clearly stated its position in regard to the effect of such waiver by counsel of certain rights of the accused. In the case of *Henry v. Mississippi,* 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564, the Court reversed conviction

and remanded the matter to the Mississippi Supreme Court in order that an evidentiary hearing could be conducted to determine whether the petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies. See this language in 379 U.S., at 451, 13 L. Ed. 2d, at 415:

> "If either (tactical) reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see Whitus v. Balkcom, 333 F.2d 496 (CA 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."

Moreover, again relying on the reasoning of the Circuit Court in *Wilson v. Gray*, supra, respondent submits that the wisdom and propriety of permitting counsel in the proper circumstances to effectively waive certain rights of the accused as a matter of trial strategy or tactics is suggested by sound reasoning as well as authority. This Court, in enlarging the scope of the guarantee of the right to counsel contained in the Sixth Amendment, has based such enlargement on the grounds stated in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."

Note this language in the *Wilson* opinion, as the Court comments on what to it is the significance of that part of this Court's decision in *Powell* quoted above:

"We are in hearty agreement with these views. And we think that it inevitably flows from them that, when a defendant has counsel it is counsel's decision such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there."

That is precisely what is involved here. Petitioner could not be expected to know the intricacies of preliminary hearing and the possible ramifications arising from same. He could not be expected to know that under Oklahoma law certain situations might arise wherein a prosecution witness might be later unavailable to be cross-examined at trial and that for this reason the witness should be cross-examined at preliminary hearing. It can be reasonably inferred that this is the reason he retained Mr. Parks, an experienced lawyer, and relied on his judgment in such matters. Parks exercised his judgment and, we submit, petitioner should be bound by its consequences, just as he would have been the beneficiary had his counsel's decision turned out to his advantage.

III

Petitioner had the effective assistance of counsel, notwithstanding the fact that his counsel elected not to cross-examine the prosecution's witness at preliminary hearing.

This proposition is somewhat related to the previous proposition under which the respondent submitted that counsel for an accused, by the very nature of his capacity as manager of the lawsuit, must be given decision-making authority which is binding on his client. Moreover, again as suggested previously, the right to effective representation does not mean that such representation must be flawless to be effective. Decisions of counsel which later backfire are not sufficient foundation upon

which to rest an assertion that an accused was denied the right to counsel guaranteed by the Constitution. It has been well stated in the case of *Johnson v. United States,* 380 F.2d 810 (10th Cir. 1967), that,

> "Little need be said about the claimed ineffective assistance of counsel. The counsel was retained, was a lawyer of some years of trial experience and specialized in the field of criminal law. All of the matters pointed out here to support this point pertain to trial procedures and each requires the exercise of judgment on the part of the trial counsel. In every case a lawyer loses, it is possible, in retrospect, to say that some different strategy or procedure might have brought about a better result. But this is not sufficient to sustain a claim of ineffective assistance of counsel. * * * Success is not the test of effective assistance of counsel."

This case is distinguishable from this Court's decision in the case of *Glasser v. United States,* 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457. There the defendant Glasser had retained his own counsel, but the trial court, over the defendant's objections, appointed this same attorney to represent another alleged co-conspirator to the same crime for which Glasser was charged. Glasser argued unsuccessfully to the court that there was a possibility of a conflict of interest between the two representations. This Court, in setting aside Glasser's conviction, held that counsel's representation of Glasser was not as effective as it might have been had the appointment to represent the other co-defendant not been made.

That is not this case. Here Parks was retained separately by petitioner and all of his co-defendants. There is nothing in this record to indicate that petitioner was of the opinion that

Parks' representation of the others would conflict with his own case. It should be noted in this regard that, unlike the *Glasser* case in which all the defendants were tried together under one indictment, in the case at bar, pursuant to Oklahoma law[2], severances were obtained and petitioner was tried alone. There was no conflict of interest between Parks' representation of petitioner and his representation of Woods. When Parks requested and was granted permission by the trial court to withdraw as counsel for Woods, then his full allegiance was to petitioner and he could have vigorously cross-examined Woods to the same extent as he would a witness with whom he was completely unacquainted.

It was the contention of petitioner in the Circuit Court, as he implies in that portion of his brief to which this proposition is directed, that petitioner's trial counsel was in a doubtful position because of his previous representation of Woods. Such "ethical considerations" (*Barber v. Page,* 381 F.2d, at 481) seemingly spring from the idea that Parks was restrained in possible cross-examination of Woods by the fact that he possessed certain confidential information that he gained through their previous attorney-client relationship. It is, of course, a long-established rule of the common law, embodied in many states by statute, that an attorney, counselor, or solicitor is not permitted, and cannot be compelled, to testify as to communicaions made to him in his professional character by

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[2] 22 O.S. 1961 § 838 provides: "When two or more defendants are jointly prosecuted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly in the discretion of the court."

his client. But in the absence of a contrary statute, the right to prohibit the disclosure of such communications belongs to the client and not to the attorney, and therefore the client may renounce or waive it at his pleasure.[3]

Assuming the cross-examination of Woods by Parks might have amounted to disclosure by the latter of communications between himself and his former client, we submit that such would have been permissible under the circumstances of this case, for the general rule has been recognized by this Court that where a party takes the stand and testifies to communications with his counsel, he thereby waives the privileged character of such communications. In the early case of *Hunt v. Blackburn,* 128 U.S. 464, 32 L. Ed. 488, 9 S. Ct. 125, this Court stated:

> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets. And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."

Circuit Courts have followed this Court's decision in *Hunt* in the cases of *Steen v. First Nat. Bank,* 298 F. 36 (8th Cir. 1924), *Cooper v. United States,* 5 F.2d 824 (6th Cir. 1925),

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[3] See 58 Am. Jur., Witnesses, §§ 460, 522.

and *Fransworth v. Sanford,* 115 F.2d 375 (5th Cir. 1940), cert. den. 313 U.S. 586, 85 L. Ed. 1941, 61 S. Ct. 1109, reh. den. 314 U.S. 708, 86 L. Ed. 565, 62 S. Ct. 54.

Oklahoma is in accord with that general rule. Any thoughts that Parks might have entertained about whether his cross-examination of Woods might be restricted by virtue of his previous relationship to this subject would have been removed by an examination of the decisions of the Oklahoma courts construing the statute relating to privileged communications.* All of the pertinent decisions of the said courts hold, in effect, that where a client takes the witness stand and testifies as to communications made by him to his attorney, such action entirely removes the bond of secrecy provided by law as to such communications. See *Tiger v. Lozier,* 124 Okl. 260, 256 P. 727 cert. den. 275 U.S. 496, 72 L. Ed. 392, 48 S. Ct. 117, *Boring v. Harber,* 130 Okl. 251, 267 P. 252, and *Brown v. State,* 9 Okl. Cr. 382, 132 P. 359.

If the waiver rule makes it permissible for the attorney to testify as to prior communications with the client after the client so testifies, then certainly it is reasonable to assume that the rule would be applicable to cross-examination by such lawyer of his former client after the client reveals the contents of such previous communications. The very reason for the rule ceases to exist where, as here, the client chooses to testify and

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* 12 O.S. 1961 § 385 provides in relevant part: "The following persons shall be incompetent to testify: * * * 4. An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent."

make certain self-incriminating statements which also incriminate his co-defendants. By so testifying, Woods removed the veil of secrecy from the ultimate bit of information that he could possibly have previously related to Parks; that is, that he, along with his co-defendants, committed the crime in question. Therefore, if Parks was ineffective at preliminary hearing, it was because he chose to be ineffective, and this decision, we submit, is binding upon the petitioner.

IV

There are exceptions to the constitutional guarantee of confrontation of witnesses, and in this case adequate foundation was laid to support the introduction of the transcript of testimony at preliminary hearing as a substitute for the appearance of this witness in person.

Under the first proposition of this brief, it has been submitted that this Court's decision in *Pointer v. Texas* is itself sufficient authority for our contention that the right of confronation is not a rigid, inflexible and absolute right, so that point need not here be further belabored. There remains the question of whether, under the facts of this case, the trial court was justified in ruling that it had been sufficiently demonstrated that the prosecution's witness was unavailable, so that his testimony might be introduced by reading to the jury the transcript of his testimony at preliminary hearing.

This Court in the *Pointer* case did not have to reach the question of whether the prosecution made sufficient showing that the witness was unavailable and that the trial court should

therefore permit his testimony to be read. The only evidence put on in this regard was that the witness had moved to California and did not intend to return to Texas. The reasonable deduction could be made, however, that the Court was of the opinion that this was an adequate showing, since it indicated that there would likely have been a different result had the defendant been represented at preliminary hearing by counsel who had been given an opportunity to cross-examine the witness. Thus it would appear that the Circuit Court in the case of *Government of the Virgin Islands v. Aquino*, 378 F.2d 540 (3rd Cir. 1967), which is relied on by petitioner in his brief, has gone further even than this Court has gone where the facts show that the witness is outside the state and therefore outside the trial court's subpoena jurisdiction. In *Aquino* the Court sets out rules which place on the prosecution the duty, where the witness is outside the state but his whereabouts are known, to present proof that an attempt was made to secure such witness's voluntary attendance. The Court further suggests that the prosecution has the duty to show, where the witness will not appear voluntarily, that it has attempted to make use of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, if the states involved have adopted that Act.

In the case at bar, however, not only was the subject Woods outside the State of Oklahoma at the time this petitioner came on for trial, but he was additionally incarcerated in a Federal penitentiary. It is stated in petitioner's brief that

"Cooperation between state and federal law enforcement officials is common knowledge." This language is apparently intended to suggest that perhaps the prosecutor for Tulsa County, Oklahoma might have been successful in requesting some type of arrangement whereby Woods could have been released temporarily from the Federal penitentiary in Texas and brought to Tulsa for the purpose of testifying at petitioners' trial.

It seems quite significant that the Federal statutes relating to prisons and prisoners, 18 U.S.C. § 4001, et seq., furnish no authority for such suggestion. To the contrary, the only reference in the statutes to transfers of Federal prisoners is in Sections 4082 and 4085. The former authorizes the Attorney General of the United States, in whom the control and management of Federal penal and correctional institutions is vested, to designate the places of confinement of Federal prisoners and at any time to transfer such prisoners from one place of confinement to another. The latter section empowers the Attorney General, when he finds it in the public interest to do so and when requested to do so by the Governor of a State, to cause Federal prisoners, prior to their release, to be transferred to a State penal institution, where such prisoners have been indicted, informed against or convicted of a felony in a court of record of any State. It is by authority of these statutes that the United States Government, through its Attorney General, frequently releases Federal prisoners to State officials for service of State sentences, without loss of Federal jurisdiction to again claim such prisoners for service of the

remainder of their Federal sentences. See *Lipscomb v. Stevens,* 349 F.2d 997 (6th Cir. 1965), cert. den. 382 U.S. 993, 15 L.Ed.2d 479, 86 S. Ct. 573, and *Murray v. United States,* 334 F.2d 616 (9th Cir. 1964), cert. den. 380 U.S. 917, 13 L.Ed.2d 802, 85, S. Ct. 906. We are referred to no such statutory or case authority, nor are we aware of any, for the release of a Federal prisoner to State officials for the purpose of having such prisoner testify in the trial of another accused.

The respondent submits that the State prosecutor sustained his burden of establishing sufficient foundation for the necessity of reading Woods' testimony from the preliminary hearing by showing to the satisfaction of the trial court that Woods was indeed unavailable, in that he was confined in a Federal penitentiary outside the State of Oklahoma.

CONCLUSION

Notwithstanding the undisputed right of an accused, under the Sixth Amendment's guaranty, to confront witnesses against him, it has been demonstrated by this Court that this is not an absolute and inflexible right to confront such witnesses face to face at trial. It has been well stated by the Court in the early case of *Mattox v. United States*, 156 U. S. 237, 39 L. Ed. 409, 15 S. Ct. 337, to which the Court refers in *Pointer v. Texas,* supra, that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of

public policy and the necessities of the case", and further that "The law, in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." This Court has further demonstrated that it is of the opinion that the constitutional guaranty of confrontation is limited to the assurance of the right of cross-examination of a witness, by counsel on behalf of the accused, before the testimony of such witness may be later used against the accused at trial. This assumes, of course, that the prosecution first makes sufficient showing of the unavailability of the witness who has previously testified.

In the case at bar, respondent submits, the witness Woods was in fact unavailable, but he had previously been on the witness stand at the petitioner's preliminary hearing, at which time counsel who had been retained by petitioner had a complete and adequate opportunity to cross-examine him. Counsel elected not to exercise the right afforded him at that time and, since he was manager of his client's lawsuit, this decision was binding upon his client, who now complains. Under these facts, an exception was properly applied by the trial court to the constitutional right of the petitioner to be confronted by this witness at trial.

The respondent prays, therefore, that this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit denying the writ of habeas corpus.

Respectfully submitted,

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CHARLES L. OWENS
Assistant Attorney General

February, 1968.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,

Petitioner,

—v.—

RAY H. PAGE, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INDEX

SUBJECT INDEX

	Page
Additional Applicable Statute	1
Additional Statement of the Case	2
ARGUMENT IN REPLY:	
I. A Writ of Habeas Corpus Ad Testificandum Should Have Been Sought in Order to Afford Petitioner the Constitutional Right of Confrontation	3
II. *Pointer* v. *Texas* Is Not to Be Confined Narrowly	4
III. Parks' Inability to Waive Petitioner's Constitutional Rights and to Represent Petitioner Effectively Arises Not From Parks' Previous Relationship With Co-Defendant Woods, but From His Relationship With Woods Following Ostensible Withdrawal at the Preliminary Hearing	5
Conclusion	7

TABLE OF AUTHORITIES CITED

CASES:

Barber v. *Page*, 355 F.2d 171	2
Barber v. *State*, 388 P.2d 320	2
Brubaker v. *Dickson*, 310 F.2d 30 (9th Cir., 1962)	7
Burgett v. *Texas*, 389 U.S. 109 (1967)	4
Carbo v. *U. S.*, 364 U.S. 611	3
Fay v. *Noia*, 372 U.S. 391 (1962)	7
Henry v. *Mississippi*, 379 U.S. 443 (1965)	6

Page

Marchetti v. *U. S.*, No. 2, O.T. 1967, —— U.S. ——, 36 USLW 4143 8

Pointer v. *Texas*, 380 U.S. 400 (1965) 4

Smith v. *Illinois*, 158 O.T. 1967, —— U.S. ——, 36 USLW 4141 ..... 4, 8

Strand v. *Schmittroth*, 251 F.2d 590 (1957) 3

U. S. v. *McGaha* (E.D. Tenn., 1962), 205 F.Supp. 949 3

Wilson v. *Gray*, 345 F.2d 282 (9th Cir., 1965) 6

STATUTE:

28 U.S.C. 2241(c)(5) 3

IN THE SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONER

Additional Applicable Statute

In addition to the constitutional provisions and statute cited in Petitioner's opening brief, because of Respondent's statement (p. 22) of awareness of statutory authority for the release of a Federal prisoner to state officials for the purpose of having such prisoner testify in the trial of another accused, it is necessary to cite 28 U.S.C. 2241(c)(5):

> "(a) Writs of habeas corpus may granted by the Supreme Court, any justice thereof, the district courts

and any circuit judge within their respective jurisdictions.

• • • • •

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • • • •

"(5) It is necessary to bring him into court to testify or for trial."

Additional Statement of the Case

The witness Co-Defendant Woods was not cross-examined by Mr. Parks, Petitioner's attorney at the trial, who, during the preliminary hearing, withdrew as Woods' attorney.[1] Respondent so implies in its Brief in this Court (page 2, last sentence of first full paragraph), and so conceded in the Court of Appeals. (*Barber* v. *Page,* 355 F.2d 171, at 172) The United States District Court for the Eastern District of Oklahoma so noted. (A. 52) For this reason, the quotation from the opinion of the Oklahoma Court of Criminal Appeals in *Barber* v. *State,* 388 P.2d 320 (A. 28-41) printed at page 3 of Respondent's brief, is inappropriate.

There is no basis in the record for the statement at page 15 of Respondent's brief that Parks was retained separately by Petitioner and all of his co-defendants.

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[1] Attention is called to a regrettable error in Petitioner's Brief, at page 3, in the last sentence of the first paragraph. The sentence should read: "Woods was not cross-examined by Parks but was *cross-examined* by a different attorney for another jointly accused" (A. 61). (Emphasis shows change from wrong word "represented".)

ARGUMENT IN REPLY

I.

A Writ of Habeas Corpus Ad Testificandum Should Have Been Sought in Order to Afford Petitioner the Constitutional Right of Confrontation.

In our opening Brief, we urged that the state has or should have a greater burden with respect to proving unavailability of a witness than a stipulation that the absent witness is in a federal penitentiary in a neighboring state. (Petitioner's Brief, page 15) We continued:

> "Cooperation between state and federal law enforcement officials is common knowledge."

Respondent says it is unaware of authority for the release of a Federal prisoner to State officials for the purpose of having such prisoner testify in the trial of another accused. (Respondent's Brief, page 22) The statutory authority is found in 28 U.S.C. 2241(c)(5), *supra*, pp. 1-2. A federal court has jurisdiction to issue the writ extraterritorially to the Warden of the Federal prison in another jurisdiction in a proper case. *U. S.* v. *McGaha* (E.D. Tenn., 1962), 205 F.Supp. 949. *Accord, Carbo* v. *U. S.*, 364 U.S. 611 (Writ of Habeas Corpus Ad Prosequendum) The cooperation, at least in respect of Writs of Habeas Corpus Ad Prosequendum, sometimes arises from consent of one sovereign to proceedings by the other. *Strand* v. *Schmittroth*, 251 F.2d 590 (1957)

II.

Pointer v. Texas Is Not to Be Confined Narrowly.

At page 6 of its Brief, Respondent suggests that *Pointer* v. *Texas,* 380 U.S. 400 (1965) should be limited to the facts of that particular case. Respondent states that, "This Court has, very probably, already so limited that decision • • • ." Neither *Burgett* v. *Texas,* 389 U.S. 109 (1967), nor *Smith* v. *Illinois,* 158 O.T. 1967, decided January 29, 1968, —— U.S. ——, 36 USLW 4141, so indicates. Indeed, as Judge Aldrich said in dissent in this case:

> "The right of confrontation, although but recently imposed upon the states, is an old and valuable right. Kirby v. United States, 1899, 174 U.S. 47. I do not take it that the extension by Pointer v. Texas, 1965, 380 U.S. 400, was only half-hearted; we must be guided fully by the Supreme Court decisions. The esteem in which the Court holds this right is illustrated by its recent case of Parker v. Gladden, —— U.S. ——, 12/12/6 . Cf. Brookhart v. Janis, 1966, 384 U.S. 1." (A. 62)

III.

Parks' Inability to Waive Petitioner's Constitutional Rights and to Represent Petitioner Effectively Arises Not From Parks' Previous Relationship With Co-Defendant Woods, but From His Relationship With Woods Following Ostensible Withdrawal at the Preliminary Hearing.

With candor, Oklahoma concedes, "There having apparently been a *previous* agreement made between the prosecution and Woods, the prosecution called Woods to testify at this (preliminary) hearing." (Emphasis supplied) (Respondent's Brief, page 2, first full paragraph) At the time of the "previous agreement" with the prosecution, Woods was represented by Parks. After advising Woods of his right to claim the privilege against self-incrimination, Parks was granted leave to withdraw as Woods' attorney. (A. 61) Thereafter, Parks failed to cross-examine Woods. Oklahoma contends this was a tactical decision. In so contending, Oklahoma overlooks the obvious practical difficulty Parks would have had in cross-examining Woods concerning the very "previous agreement" made with the prosecution by Parks, as attorney for Woods. Having failed to cross-examine Woods to ask him about the terms of the "previous agreement", Parks continued to represent Petitioner not only at the preliminary hearing, but at trial. Trial ended. Petitioner was found guilty. Commencing 15 days subsequent to the conclusion of Petitioner's trial, Parks appeared as Woods' counsel four times in three criminal cases against Woods in the United States District Court. (Appendix to Petitioner's opening Brief).

Respondent's Brief makes no mention of the events set forth above. Indeed, comment on the contents of Appendix A to Petitioner's opening Brief is conspicuously absent. Oklahoma urges that Parks "chose to be ineffective" at the preliminary hearing. (Respondent's Brief, page 19) The "choice to be ineffective" is characterized as "counsel's exercise of trial strategy and tactics". (Respondent's Brief, page 10). In so characterizing Parks' conduct of his representation of Petitioner, Respondent relies on *Wilson* v. *Gray*, 345 F.2d 282 (9th Cir., 1965)[2] Respondent overlooks the fact that in *Wilson* v. *Gray*, the Court of Appeals for the Ninth Circuit quoted the language of this Court from *Henry* v. *Mississippi*, 379 U.S. 443 (1965),[3] which appears at page 12 of Respondent's Brief, and it emphasized the words *"where the circumstances are exceptional"*. What could be more exceptional circumstances than:

(1) Ostensible withdrawal by Parks as counsel for Woods at the preliminary hearing in the state court system following the making of the "previous agreement" with the prosecution;

(2) Failure of Parks during the preliminary hearing to cross-examine Woods on behalf of Petitioner;

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[2] In *Wilson* v. *Gray* the Court points out, 345 F.2d at page 287, that of "seven short pages" of testimony at the preliminary hearing, only a minor part (reproduced in full in a footnote) was direct examination. The case is inapposite here, where there was no cross-examination—either in the presence of the Court or anywhere else. Moreover, *Wilson* v. *Gray* stands for case-by-case determination on the totality of the circumstances.

[3] This Court's disposition of *Henry* v. *Mississippi* is one of the alternatives suggested in the conclusion of Petitioner's opening Brief; i.e., remand to ascertain if there was waiver of the right of confrontation (Petitioner's Brief, page 20).

(3) Subsequent appearance by Parks as counsel for Woods in the federal court proceedings;

(4) In connection with the "offer of proof" in support of his objection to the admission of the transcript of the preliminary hearing stipulating that Woods was outside the jurisdiction of the Oklahoma Court.[4]

Conclusion

Oklahoma insists Petitioner is bound by Parks' judgment (Brief of Respondent, page 14), and that that judgment, "a choice to be ineffective" (Respondent's Brief, page 19) is "the considered choice of the petitioner." Under the standards prescribed in *Fay* v. *Noia,* 372 U.S. 391 (1962), it strains credibility to believe that an accused would choose to have his counsel be ineffective; it is inconceivable that an accused would choose to forego the vital constitutional right of confrontation and cross-examination. Can an attorney's choice to be ineffective vitiate the constitutional

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[4] At the time of appeal to the Oklahoma Court of Appeals, Parks recognized that this stipulation was harmful. In the brief on appeal, the following appears:

"* * * It should be pointed out here that there is no evidence in the record other than the offer of proof set out above, made by the defendant and denied by the Court, tending to show in any way why the witness, Charles Henry Woods, could not be present to testify in person and confront this defendant, as required by the Constitution and the Statutes of the State of Oklahoma" (A. 20).

"Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree." *Brubaker* v. *Dickson,* 310 F.2d 30 (9th Cir., 1962) quoted in *Wilson* v. *Gray, supra.*

commands which are "organic living institutions whose significance is vital, not formal"? *Marchetti* v. *U. S.*, No. 2, O.T. 1967, decided January 29, 1968, —— U.S. ——, 36 USLW 4143. A choice to be ineffective is a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Smith* v. *Illinois, supra.*

Respectfully submitted,

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March 20, 1968

SUPREME COURT OF THE UNITED STATES

No. 703.—October Term, 1967.

Jack Allen Barber, Petitioner,
v.
Ray H. Page, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April 23, 1968.]

Mr. Justice Marshall delivered the opinion of the Court.

The question presented is whether petitioner was deprived of his Sixth and Fourteenth Amendment right to be confronted with the witnesses against him at his trial in Oklahoma for armed robbery, at which the principal evidence against him consisted of the reading of a transcript of the preliminary hearing testimony of a witness who at the time of trial was incarcerated in a federal prison in Texas.

Petitioner and one Woods were jointly charged with the robbery, and at the preliminary hearing were represented by the same retained counsel, a Mr. Parks. During the course of the hearing, Woods agreed to waive his privilege against self-incrimination. Parks then withdrew as Woods' attorney but continued to represent petitioner. Thereupon Woods proceeded to give testimony that incriminated petitioner. Parks did not cross-examine Woods, although an attorney for another codefendant did.

By the time petitioner was brought to trial some seven months later, Woods was incarcerated in a federal penitentiary in Texarkana, Texas, about 225 miles from the trial court in Oklahoma. The State proposed to introduce against petitioner the transcript of Woods' testimony at the preliminary hearing on the ground that Woods was unavailable to testify because he was outside

the jurisdiction. Petitioner objected to that course on the ground that it would deprive him of his right to be confronted with the witnesses against him. His objection was overruled and the transcript was admitted and read to the jury, which found him guilty. On appeal the Oklahoma Court of Criminal Appeals affirmed his conviction. *Barber* v. *State*, 388 P. 2d 320 (Okla. Crim. App., 1963).

Petitioner then sought federal habeas corpus, claiming that the use of the transcript of Woods' testimony in his state trial deprived him of his federal constitutional right to confrontation in violation of the Sixth and Fourteenth Amendments. His contention was rejected by the District Court and on appeal the Court of Appeals for the Tenth Circuit, one judge dissenting, affirmed. 381 F. 2d 479 (1966). We granted certiorari, 389 U. S. 819 (1967), to consider petitioner's denial of confrontation claim, and we reverse.

Many years ago this Court stated that "The primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895). More recently, in holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that

the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U. S. 400, 405 (1965). See also *Douglas* v. *Alabama*, 380 U. S. 415 (1965).

It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. *E. g.*, *Mattox* v. *United States*, *supra* (witnesses who testified in original trial died prior to the second trial). This exception has been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement. See 5 Wigmore, Evidence §§ 1395–1396, 1402 (3d ed. 1940); McCormick, Evidence §§ 231, 234 (1954).

Here the State argues that the introduction of the transcript is within that exception on the grounds that Woods was outside the jurisdiction and therefore "unavailable" at the time of trial, and that the right of cross-examination was afforded petitioner at the preliminary hearing, although not utilized then by him. For the purpose of this decision we shall assume that petitioner made a valid waiver of his right to cross-examine Woods at the preliminary hearing, although such an assumption seems open to considerable question under the circumstances.[1]

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[1] Since Woods and his attorney Parks presumably discussed Woods' connection with the crime before the preliminary hearing, it would seem highly probable that effective cross-examination by Parks of Woods would have necessitated covering material about which Woods had made confidential communications to Parks. While the State may be correct in asserting that Woods had waived,

We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma. It must be acknowleged that various courts [2] and commentators [3] have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that "it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless." 5 Wigmore, Evidence § 1404 (3d ed. 1940).

Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law.[4]

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under Oklahoma law, his right to assert the attorney-client privilege as to those matters by testifying, at the very least serious ethical questions would seem to be presented to Parks under those circumstances. And in fact, the cases cited by the State in support of its contention that the attorney-client privilege would not have barred cross-examination by Parks involved situations where the client had testified about the existence and nature of the communications between himself and his attorney prior to the introduction of the attorney's testimony by way of rebuttal. *E. g., Brown* v. *State,* 9 Okla. Crim. 382, 132 P. 359 (1913); *Boring* v. *Harber,* 130 Okla. 251, 267 P. 252 (1927). As far as the record reveals Woods did not testify about any communications between himself and Parks and hence the applicability of the foregoing cases is questionable.

[2] See cases collected in 5 Wigmore, Evidence § 1404, n. 5 (3d ed. 1964 Supp.).

[3] *E. g.,* McCormick, Evidence § 234 (1954).

[4] For witnesses not in prison, the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the wit-

For example, in the case of a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c)(5) gives federal courts the power to issue a writ of habeas corpus *ad testificandum* at the request of state prosecutorial authorities. See *Gilmore* v. *United States*, 129 F. 2d 199, 202 (C. A. 10th Cir., 1942); *United States* v. *McGaha*, 205 F. Supp. 949 (D. C. E. D. Tenn., 1962). In addition, it is the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of the state court.[5] Cf. *Lawrence* v. *Willingham*, 373 F. 2d 731 (C. A. 10th Cir., 1967) (habeas corpus *ad prosequendum*).

In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, "the possibility of a refusal is not the

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ness is found directing the witness to appear in court in the first State to testify. The State seeking his appearance must pay the witness a specified sum as a travel allowance and compensation for his time. As of 1967 the Uniform Act was in force in 45 States, the District of Columbia, the Panama Canal Zone, Puerto Rico, and the Virgin Islands. See 9 Uniform Laws Ann. 50 (1967 Supp.). For witnesses in prison, quite probably many state courts would utilize the common-law writ of habeas corpus *ad testificandum* at the request of prosecutorial authorities of a sister State upon a showing that adequate safeguards to keep the prisoner in custody would be maintained.

[5] Department of Justice, United States Marshals Manual §§ 720.04–720.06. Cf. Brief for the United States as Amicus Curiae, *Smith* v. *Hooey*, No. 495 Misc., October Term, 1967 (habeas corpus *ad prosequendum* from state court normally honored by Bureau of Prisons).

equivalent of asking and receiving a rebuff." 381 F. 2d, at 481. In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

The State argues that petitioner waived his right to confront Woods at trial by not cross-examining him at the preliminary hearing. That contention is untenable. Not only was petitioner unaware that Woods would be in a federal prison at the time of his trial, but he was also unaware that, even assuming Woods' incarceration, the State would make no effort to produce Woods at trial. To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Brookhart* v. *Janis*, 384 U. S. 1, 4 (1966).

Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See *Motes* v. *United States*, 178 U. S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for

holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.[6]

The judgment of the Court of Appeals for the Tenth Circuit is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[6] Cf. *Holman* v. *Washington*, 364 F. 2d 618 (C. A. 5th Cir., 1966); *Government of the Virgin Islands* v. *Aquino*, 378 F. 2d 540 (C. A. 3d Cir., 1967).

SUPREME COURT OF THE UNITED STATES

No. 703.—October Term, 1967.

Jack Allen Barber, Petitioner,
v.
Ray H. Page, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April 23, 1968.]

Mr. Justice Harlan, concurring.

I agree that the State's failure to attempt to obtain the presence of the witness denied petitioner due process, and I therefore concur in the opinion of the Court on the premises of my opinion in *Pointer* v. *Texas,* 380 U. S. 400, 408.